TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 359

HUGH ALLEN BOWEN, PETITIONER,

vs.

JAMES A JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 16, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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HUGH ALLEN BOWEN, PETITIONER,

vs.

JAMES A JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 18, 1938.

—7956

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 22539-L

PETITION FOR WRIT OF HABEAS CORPUS—Filed September 25, 1937

To the Honorable A. F. St. Sure, Judge of said District Court and to said District Court and to any Judge thereof:

The petition of Hugh Allen Bowen respectfully shows to the Court:

That he is now in prison and restrained of his liberty by James A. Johnson, Warden, United States Penitentiary, at Alcatraz, California, County of San Francisco and within the jurisdiction of this Court. Petitioner is a citizen of the United States.

That your petitioner is thus imprisoned and held in custody under color of the authority of the constitution and laws of the United States in connection with a certain trial had in the District Court of the United States, for the Northern District of Georgia, on or around February 6, 1932. Just what sort of order, claim or authority petitioner is held under is unknown to him, but he alleges that he is held without authority of law.

Petitioner was indicted jointly, that is in the same bill of indictment, with John E. Smith and Frank Bowen, all three of which were charged with the murder of one Raymond Kington, it being alleged that said crime was committed in the Rome Division of said Northern District of Georgia. Attached hereto is a copy of the indictment which is made a part of this petition and proceedings, and marked Exhibit "A".

[fol. 2] It is claimed that petitioner was convicted and sentenced to be imprisoned for and during the period of his natural life. Petitioner shows that said imprisonment is illegal and in violation of the constitution and laws of the United States for the following reasons to-wit:

1st

That the bill of indictment is so defective that it is insufficient to charge any crime against the United States and is void.

2nd

That the allegations and charges in the indictment are defective and insufficient to show jurisdiction over the person and subject matter and it is therefore void and no legal judgment could be based thereon. That the presumption is against jurisdiction in the United States or Federal Courts and that same cannot be shown or conferred by consent or by mere averments in the Bill of indictment.

3rd

That the indictment is defective and void and any verdict and judgment rendered thereon are fatally defective and void for that it was necessary for the United States District Court to show jurisdiction over the person of the defendant, of the crime charged, and of the exact territory or place where it was alleged to have been committed, to wit, Chickamauga National Park otherwise than by showing or alleging that it was committed within the jurisdiction of the court without fixing a definite place or location or even the county [fol. 3] where committed and without attempting to show exclusive jurisdiction over this national park otherwise than by merely aver-ing tha' said jurisdiction had been conferred upon the United States Courts as follows: "And within the jurisdiction of said court and within a certain place and on certain lands reserved and acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, and acquired by the United States *States* by consent of the legislature of the State of Georgia".

4th

That no exclusive jurisdiction over said Chickamauga National Park could be so granted by mere consent of the legislature of the State of Georgia, and that to confer and release exclusive criminal jurisdiction to the United States, it would be necessary that the territory, place or places be regularly ceded to the United States by the State of Georgia and that for this reason the indictment was fatally defective even in the absence of a demurrer and no legal judgment or sentence could be based thereon.

5th

That said indictment is void because it does not set forth verbatim or in substance any consent or act of the legis-

lature of Georgia ceding or seeking to cede criminal jurisdiction to the United States, the territory and lands referred to in the indictment, any such consent or act being a local law when taken in connection with federal procedure, which [fol. 4] is necessary to be pleaded.

6th

That said indictment is fatally defective and void and any verdict and judgment rendered thereon is defective and void because under any conviction thereunder a defendant would be denied due process of law for reasons as follows to wit:

1st

That indictment is defective and void in the absence of a demurrer for that said indictment does not even charge a crime against this petitioner or either of the other defendants because it does not state the specific species of offense or the degrees of the alleged offense and does not descend to particulars as required by law.

2nd

For that the indictment necessarily seeks to allege but does not allege a common design and purpose upon the part of the three defendants to kill and murder the deceased and does not allege or sufficiently charge any conspiracy or unlawful agreements to compass a criminal purpose as required by law.

3rd

For that the indictment does not charge a common design conformable to the federal statute against murder and does not allege guilty knowledge, criminal purpose or any sort of co-operation among the three defendants and does not show or aver any guilty knowledge upon the part of this [fol. 5] petitioner, which is fatally defective even after verdict and petitioner is, as a matter of right, entitled to his discharge under a Writ of Habeas Corpus.

4th

That said indictment if fatally defective and any judgment and sentence based thereon, if there be such, is fatally defective and void because all material facts as to the time, the place (Chickamauga National Park embraces as peti-

tioner is informed and believes, over 28,000 acres of land embracing large areas of territory of both Walker and Catoosa Counties), and circumstances of the alleged crime are not set forth with any sort of definiteness, certainty or particularity.

5th

Because defendant was denied due process of law for that the case was transferred from the Atlanta Division of the District Court to the Rome Division thereof upon motion of the District Attorney without the consent of petitioner and not being so transferred upon motion made by petitioner and because the case was tried in the county of Floyd in the State of Georgia, instead of in the county of Catoosa where the crime is supposed to have been committed, and at a place and in a county where no part of Chickamauga National Park lies, the counties of Chattooga and Walker lying in between the counties of Floyd and Catoosa in the State of Georgia, and said trial being had at a place around 55 miles from the scene of the alleged crime.

[fol. 6] 6th

The indictment is fatally defective because it does not allege any act done or committed by this petitioner and does not allege any criminal intent, design or purpose upon his part to commit a crime.

7th

That he is deprived of his lawful and rightful day in court and due process of law because the bill of indictment does not give full notice of all the material facts constituting the offense charged, that is to say with at least reasonable certainty and definiteness in what county and place by reference to other known objects or location where the crime was committed, how it was committed, what part thereof, if any, this petitioner did and performed and the circumstances under which it was committed, if so committed, without which allegations and charges there can be no due process of law and petitioner is dischargeable under the hight prerogative Writ of Habeas Corpus.

8th

Because petitioner was not furnished with a copy of the indictment and a list of witnesses as required by law, prior to his trial.

9th

Because said District Court and the Judge thereof did not have a stenographic copy of the testimony at the trial taken down and preserved so that petitioner and his at-
[fol. 7] torney might hope to appeal the case to a higher court, and petitioner says that for this reason he was denied due process of law and equal protection under the law to which he was entitled.

10th

Because under the allegation in the indictment only one of the defendants could be guilty of the crime and since Smith now takes it all on himself, petitioner should be acquitted, liberated and vindicated in justice, in grace, at the hands of this court.

11th

Because petitioner was convicted along with John E. Smith of an offense that, under the Bill of Indictment, only one of them could have committed, it being impossible for both of them to be guilty under the averments, charges and physical facts charged in the bill of indictment.

12th

The indictment is fatally defective in the absence of a demurrer because it fails to allege that the killing was done wilfully, *feloniously* and of malice aforethought, because the felonious intent is an essential ingredient of the crime, and that such is a substantial defect not cured by verdict.

13th

The indictment is fatally defective even in the absence of a demurrer for that there are no criminal acts or criminal intent charged against petitioner with any degree of reason-
[fol. 8] able particularity as to the time, place or circumstances.

14th

Petitioner avers and shows that the denial of the substantial rights as set forth was a denial of due process of law as contemplated and guaranteed by the fifth amendment to the constitution of the United States, the material part of which reads as follows: "No person * * * shall be deprived of life liberty or property without due process of law." Petitioner avers that he was denied that fair and impartial trial according to the established customs and of immemorial usage, part of which came to every American citizen from the great common law of England, recognized and vouch-safed to every citizen of the United States, the cardinal rules of which have been in force in England and America since the Magna Charter was wrested from King John at Runnymede.

Petitioner avers that the denial to him of his rights and the disregard of his legal and constitutional right as herein set forth was a contravention of the principles of liberty and justice, which inhere in the very idea of a free government which principles are immutable and to which every defendant is entitled by virtue of due process of law, the law of the land, which implies and requires conformity to those immutable and fundamental principles which neither Congress nor any State in the Union can disregard, which great cardinal and salutary fundamental principles were [fol. 9] designed to secure each individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.

It being the policy of Federal courts to regard Habeas corpus as a matter of grace we submit that it is highly proper to discharge the defendant upon other grounds to-wit:

1st

That two fellow prisoners, one Wayne Jarrett and one Robert L. Hollifield, made affidavits voluntarily while petitioner and said John E. Smith were stationed at the Atlanta penitentiary, that Smith made a voluntary, unsolicited statement to them one day that Bowen, your petitioner, had nothing to do with the commission of the murder, that he killed Kington himself and alone while Bowen lay fast asleep in an automobile and that Bowen knew nothing of the killing

until after it was all done and committed. Copies of these two affidavits are attached hereto and made a part hereof, and marked Exhibits "B" and "C", respectively.

2nd

Petitioner submits that while ordinarily the writ of Habeas Corpus will not be granted where there is a remedy by writ of error or appeal, that in rare cases it is proper to issue it although such other remedy exists and that the case as submitted above and hereinafter is a rare case and [fol. 10] that the writ of Habeas Corpus is the proper remedy.

3rd

Petitioner submits another cardinal reason why he should be discharged to-wit: While he was tried February 6, 1932, that upon his application later the certified copy of the Bill of Indictment purporting to carry all entries and notations thereon furnished to him under the signature of the Clerk of the United States District Court for the Northern District of Georgia, bearing date of February 2, 1933, bearing the official seal thereof and that said certified copy carries no verdict and no judgment or sentence, the spaces and places allotted therefor are wholly blank with nothing written thereon. Wherefore petitioner says that there is no judgment of conviction or sentence upon which to base his committment or detention, and that for thi*d* reason, within and of itself petitioner should be speedily discharged. (See certified copy of Bill of Indictment as herein set forth, with all entries thereon under Exhibit "A", attached to this petition.)

4th

Because the United States has no exclusive jurisdiction over Chickamauga National Park.

5th

Petitioner would show another cardinal reason why he [fol. 11] should be liberated under the high prerogative writ of Habeas Corpus in view of the decisions of the Supreme Court of the United States to the effect that the general policy of federal courts is to regard Habeas Corpus, a matter of grace rather than a matter of right and because of petitioner's good conduct since confinement and because

of the expressed opinion of Judge E. Marvin Underwood, District Judge of the United States Courts for the Northern District of Georgia, in whose court and before and by whom petitioner was tried with the aid of a jury, to the effect that in his opinion it would be proper and well to liberate petitioner if "his conduct and attitudes since conviction have been such as to show that a reformation has taken place in his character and that it would be safe to restore him to society * * *, said Judge Underwood stating that he felt that the question (of release) should be determined by his subsequent conduct and attitudes. These expressions of opinion by Judge Underwood having been made in a letter dated Atlanta, Ga., May 8, 1937, addressed to Mrs. W. L. Bowen, mother of petitioner at La Fayette, Ga. Copy of said letter is hereto attached and marked Exhibit "D", and made a part of this petition.

5th

Petitioner shows that he was convicted upon purely circumstantial evidence with no direct evidence whatever to corroborate it and in view of the fact that circumstantial evidence is always at best uncertain, fallible, treacherous, dangerous and unreliable, and that he should be speedily liberated at this time.

[fol. 12]

6th

Petitioner submits other grounds upon which he importunes the court to discharge him at this time to wit:

1st

On account of his youth, being only 28 years of age at the time of the alleged crime, his inexperience and his first time in any court.

2nd

On account of his conviction being based purely and solely upon circumstantial evidence.

3rd

On account of his burning desire to be with and provide for his litile daughter, Frances Bowen, who is only 10 years of age and of his hearts desire to be with or near his

mother, who is a widow, that he may assist her, she being without property or remunerative position.

4th

On account of petitioner's absolute innocence of the charge.

Wherefore petitioner prays:

That a proper writ of Habeas Corpus may issue out of the District Court of the United States for the Northern District of California, directed to the said James A. Johnson, Warden of the United States Penitentiary at Alcatraz, California, within and under the jurisdiction of this court requiring him to produce the body of your petitioner before said court at some convenient time to be therein designated [fols. 13-14] there to abide what shall be awarded by the court in the premises to the end that your petitioner may be hence discharged from said detention and imprisonment.

Hugh Allen Bowen (Hugh Allen Bowen, Petitioner, Sign Here). David F. Pope, Attorney for Petitioner, La Fayette, Ga.

Duly sworn to by Hugh Allen Bowen. Jurat omitted in printing.

[fol. 15] EXHIBIT "A" TO PETITION

UNITED STATES OF AMERICA, NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

In the District Court of the United States, in and for the Division and District aforesaid, at the October term thereof, A. D. 1931.

The Grand Jurors of the United States impanneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oath present that John E. Smith, alias John Eddington, Hugh A. Bowen, alias Hugh Allen, alias Henry Boss, and William Frank Bowen, alias Frank Bowen, hereinafter called the defendants, on the 14th day of December, in the year 1930 A. D. in the Rome Division of the District aforesaid, and within the jurisdiction of said court, and within a certain place and on certain lands reserved and

acquired for the exclusive use of the United States and under exclusive jurisdiction thereof, and acquired by the United States by consent of the Legislature of the State of Georgia, to wit: Chickamauga and Chattanooga National Park, sometimes known as Chickamauga and Chattanooga National Military Park, in said State of Georgia did then and there unlawfully, willfully, deliverately and with malice aforethaught upon one, Raymond Kington, a human being, make an assault and did then and there him, the said Raymond Kington, unlawfully, willfully, deliberately, maliciously, premedi-atedly and with malice aforethaught kill and murder by shooting and wounding him, the said Raymond Kington, in the head, neck and face with a certain [fol. 16] loaded shotgun, a more perfect description of said shotgun being to the grand jurors unknown, then and there held in the hands of one of said defendants but which particular one of said defendants is to the grand jurors aforesaid unknown, the said loaded shotgun being then and there an instrument likely to produce death, and said defendants did thereby inflict, cause and produce a certain mortal wound and wounds in the head, neck and face of him, the said Raymond Kington, from which mortal wound and wounds by the said defendants so inflicted aforesaid, he, the said Raymond Kington, on the 14th day of December A. D. 1930, did then and there die; Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. Clint W. Hager, United States Attorney.

(Entries on back of Indictment to wit:) 2579 Rome, United States District Court, Atlanta Division, Northern District of Georgia. The United States vs. John E. Smith, alias John Eddington, Hugh A. Bowen, alias Henry Boss and William Frank Bowen, alias Frank Bowen, Catoosa County, Ga. Indictment for Violation of section 273 Penal Code, Murder on Government Reservation. A true Bill, Harold N. Cooledge, Foreman of Grand Jury. Filed in Open Court Nov. 13th. 1931, O. C. Fuller, Clerk by Jon Dean Steward, Deputy Clerk, Clint W. Hager, U. S. Attorney. BW Nov. 16, 1931, Smith and Hugh Bowen, BW Dec. 7th, 1931, W. Frank Bowen. Back or Cover of Indictment with Plea and Judgement. Witnesses: E. F. Land, J. F. Kington, J. M. Kington, Martha M. McDearman. [fol. 17] This case transferred from Atlanta to Rome by

order of court on motion of District Attorney, and filed and docketed the 11th, day of May A. D. 1932, O. C. Fuller, Clerk, by John L. Harris, Deputy Clerk.

UNITED STATES OF AMERICA,
Northern District of Georgia, ss:

I, Jon Dean Steward, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached is a true, full, complete and correct copy of the indictment with entries and notations thereon, in the matter of the United States of America vs. John E. Smith, alias John Eddington, Hugh A. Bowen, alias Henry Boss, and William Frank Bowen, alias Frank Bowen, Indictment No. 2579, of file in the Clerk's office of said District Court at Rome, Georgia. In testimony whereof I hereunto set my hand and affix the seal of said District Court at Atlanta, Georgia, this the 2nd day of February A. D. 1933.

Jon Dean Stewart, Clerk United States District Court, Northern District of Georgia. (Seal Impressed here, bearing words "U. S. District Court, N. D. Georgia.")

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA, ROME DIVISION, —— TERM, 193—

No. 2579

THE UNITED STATES OF AMERICA

vs.

JOHN E. SMITH, Alias JOHN ADDINGTON, HUGH A. BOWEN, Alias HENRY BOSS, and WILLIAM FRANK BOWEN, Catoosa County, Ga.

Certified Copy of Indictment

[fol. 18] On the indictment is the following:

Plea

The defendant —— —— waives arraignment and pleads —in open Court, this — day of ——, 19—.

—— ——, Defendant.

Verdict

We the jury find the defendant —— —— this — day of —— 193—.

—— ——, Foreman.

Judgment

—Certified copy of foregoing Indictment Within, ——.

[fol. 19] EXHIBIT "B" TO PETITION

COUNTY OF FULTON,
State of Georgia, ss:

Affidavit

Wayne Jarrett, who being duly sworn, deposes and says that he is a citizen of the United States of legal age and that he knows the nature and import of an oath.

Affiant further states that he was on the Stockade of the U. S. Prison at Atlanta, Ga. in the early part of August 1933, talking to a man by the name of Robert L. Hollifield and showing him some letters concerning my parole and asking him if he would help me prepare them. While Hollifield and myself were discussing them a man came up to us and asked Hollifield if he was a nurse in the hospital. Hollifield told him yes and then this man asked Hollifield if he knew a man over there in the hospital who had kidney trouble by the name of Hugh Bowen. Hollifield told him that he did and that Bowen was in bad shape at that time. This man then said he was here on the same charge as Bowen. Hollifield then said to him that Bowen had told him that there was another man here on the same charge and for the same crime. This man then told affiant and Hollifield that his name was Smith and that he Smith, had the same amount of time in prison as Bowen. Affiant Smith and Hollifield then all began to discuss the amount of time that both Bowen and Smith had, and then I asked Smith how it was that two men, Bowen and Smith had received so much time for the same crime and why it was that one of them, Smith and Bowen, did [fol. 20] not take the blame for the crime and let the other go free. Smith then began to cuss Bowen and said that he

Bowen, was the cause of it all. Hollifield then told Smith that Bowen was of the opinion that he, Smith, had intended to kill him, Bowen. Smith then told Hollifield, hell no for if I had intended to do that all that I would had to do was to go over to the car where Bowen was asleep and drunk and had passed out. Smith then further stated that Bowen did not know anything about where the man was killed as he was not killed where he was found. Smith then said that Bowen awoke at the sound of the gun and that it was the first that he, Bowen, knew of it. Hollifield then asked Smith where he was arrested and he, Smith, replied in the state of Oregon and that Bowen was arrested in the state of Washington. Smith then said that a darn fool in Chattanooga was the cause of their, Smith and Bowen's arrest, and that they were brought there and held in jail for two years before trial. Just at this time the bell rang and affiant returned to his cell. Affiant further states that this affidavit is freely and voluntarily made and without hope or offer of reward. Further affiant saith not.

Wayne Jarrett, Affiant. Reg. No. 42888.

Sworn and subscribed to before me this 20 day of Oct. 1933. M. O. Hollis, Notary Public. (Seal of Office Impressed.)

[fol. 21] EXHIBIT "C" TO PETITION

COUNTY OF FULTON,
State of Georgia, ss:

Affidavit

Robert L. Hollifield being duly sworn deposes and says that he is a citizen of the United States, of legal age and that he knows the nature and import of an oath.

Affiant further states that he was on the Prison Stockade here at the U. S. Prison in Atlanta, Ga. alone in the first part of Aug. 1933 under what is known as the parole three when Wayne Jarrett walked up and began to show me some papers that he, Jarrett, had received concerning his parole. Jarrett then asked me if I would help him with

his papers and while Jarrett and affiant were discussing these papers another man walked up and asked affiant if he was a nurse in the Hospital. Affiant told him yes, and he, Smith, asked if affiant knew a patient over there by the name of Hugh Bowen. Affiant told him, Smith, that I did and said that Bowen was in bad shape at this time. This man Smith then told affiant that he, Smith was here on the same crime as Bowen and then stated that his name was Smith. Affiant, Smith and Jarrett then began discussing about the amount of time that both Smith and Bowen had. Then Jarrett asked Smith why it was that both of them, Smith and Bowen, were here on the same crime and why it was not one of them, Smith or Bowen, did not take the blame and let the other go free. Smith then began to cuss Bowen and stated that Bowen was no good and that [fol. 22] Bowen was the cause of Smith trouble. Affiant then told Smith that Bowen was of the opinion that he, Smith had intended to kill him. Smith then said that if he, Smith, had intended to do that, he, Smith would have gone over to the car where Bowen was both asleep and drunk and that it would have been easy to kill Bowen as he, Bowen was so drunk that he Bowen, had passed out. Smith then said that Bowen did not know anything about where the man was killed for the man was not killed where he was found, and that the first thing Bowen knew about the killing was when the gun was fired and awoke him, Bowen. Affiant then asked Smith where he was arrested and he, Smith, said in Oregon and that Bowen was arrested in the State of Washington. Smith further said that a man from Chattanooga was the cause of the arrest and that he, the man in Chattanooga, had them brought back there and that they, Smith and Bowen, were forced to wait for nearly two years before a trial. Just at this time the bell rang and all of us returned to our cells. Affiant further states that this affidavit is freely and voluntarily made and without hope or the offer of reward. Further affiant sayeth not.

Robert Hollifield, Affiant. Reg. #42487.

Sworn and subscribed to before me this the 20 day of Oct., 1933. M. O. Hollis, Notary Public. (Seal Impressed.)

[fol. 23] EXHIBIT "D" TO PETITION

E. Marvin Underwood, District Judge.

United States Courts, Northern District of Georgia,
Judge's Chambers

Atlanta, Ga., May 8th, 1937.

Mrs. W. L. Bowen, La Fayette, Ga.

DEAR MRS. BOWEN:

Your letter of April 20th, asking that I recommend the release by commutation or pardon of your son, Mr. Hugh A. Bowen, has been received.

I do not feel that I have sufficient information at this time to make any recommendation. In cases of this kind I feel that the question of release should be largely determined by a most careful consideration of the accused's conduct and attitudes since conviction and whether or not those who have carefully studied and observed these things feel that a reformation has taken place in his character, and that it would be safe to restore him to society, and whether he would, if released, live the life of an upright citizen. The information that I got at the trial did not show such conduct up to that time as to justify a recommendation on my part, so that I feel the question should be determined by his subsequent conduct and attitudes.

[fols. 24-25] While I do not feel that I am at this time sufficiently informed to make a recommendation, I will not oppose the granting of a commutation or pardon by those who have the determination of such question.

With my sympathy and kind regards, I am,
Sincerely yours, E. Marvin Underwood, U. S. District Judge.

Original letter within.

[fols. 26-49] Statement of facts and Brief of law omitted in printing.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE—Filed September 29, 1937

Good cause appearing therefor and upon reading the verified petition on file herein:

It is Hereby Ordered,

That James A. Johnson, Warden of the United States Penitentiary at Alcatraz, California, within the jurisdiction of this court, appear before this court on the 2nd day of October, 1937, at the hour of 9:30 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the said James A. Johnson, Warden aforesaid, and a copy of the petition and this order be served upon the United States Attorney for this district, his representative herein.

And it is Further Ordered and Directed,

That said James A. Johnson, Warden aforesaid, shall retain the said Hugh Allen Bowen within the jurisdiction of this court until its further order herein.

Dated at San Francisco, California this 28th day of September, 1937.

Harold Louderback, United States District Judge.

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

RETURN TO ORDER TO SHOW CAUSE—Filed October 9, 1937

Comes now James A. Johnston, Warden of the United States Penitentiary at Alcatraz, California, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

I

That the person (hereinafter called "the prisoner") on whose behalf the petition for writ of habeas corpus was filed, is detained by your respondent, James A. Johnston, as Warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgment and sen-

tence, and order of commitment, duly and regularly issued in Criminal Case No. 2576—Rome Division, on the 16th day of February, 1933, by District Judge E. Marvin Underwood of the Northern District of Georgia, and Transfer Order No. 17448 issued at Washington, D. C. for the Attorney General of the United States of America by Sanford Bates, Director of Bureau of Prisons of the Department of Justice of the United States of America, dated August 15, 1934.

[fol. 52]

II

That a certified copy of said judgment and sentence, and order of commitment, issued as aforesaid, is annexed hereto and made a part hereof as Respondent's Exhibit "A".

III

That a certified copy of the Transfer Order issued as aforesaid is annexed hereto and made a part hereof as Respondent's Exhibit "B".

IV

That a certified copy of the record of Court Commitment of the United States Penitentiary, Alcatraz, California is annexed hereto and made a part hereof as Respondent's Exhibit "C".

Wherefore respondent prays that the petition for writ of habeas corpus be dismissed.

James A. Johnston, Warden of the United States Penitentiary at Alcatraz, California.

[fol. 53] EXHIBIT "A" TO RETURN

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION, NOVEMBER TERM, A. D. 1932

THE UNITED STATES OF AMERICA

versus

HUGH A. BOWEN Alias HENRY BOSS

CATOOSA COUNTY, GEORGIA:

True Bill of Indictment, No. 12692, returned into Open Court by the Grand Jury, at Atlanta, Georgia, and filed

November 13th, 1931, and Transferred from the Atlanta Division to the Rome Division of said District, and received and filed at Rome, Georgia, May 11th, 1932, and Numbered 2579, wherein the defendant is charged, with others, with the Offense of Murder on Government Reservation, in violation of Section 273 of the Penal Code of the United States. Plea Not Guilty, February 6th, 1933, Verdict of Guilty Without Captial Punishment" on February 11th, 1933, and Imposition of Sentence Deferred to February 15th, 1933 and Defendant Remanded to Floyd County Jail to Await Judgment of the Court. February 15th, 1933, Imposition of Sentence Further Deferred and Defendant again Remanded to Jail to await the Judgment of the Court.

Sentence.—Life Imprisonment in Such Penitentiary as the Attorney General of the United States May Designate.

The defendant in the above stated cause was convicted on the 11th day of February, A. D., 1933, of the offense charged against him in the above referred to and numbered indictment, with the qualified verdict of "Without Capital Punishment", and thereupon, for reasons satisfactory to the Court the imposition of Sentence was Deferred to the 15th day of February, A. D. 1933, and the defendant was remanded to Floyd County, Georgia, jail to await the Judgment of the Court herein, and

On February 15th, A. D. 1933, the defendant was brought into Open Court in the custody of the United States Marshal [fol. 54] to receive and abide the judgment of the Court herein, and for reasons satisfactory to the Court the imposition of sentence was deferred from day to day, until the further order of the Court, and he was again remanded to Floyd County Jail to the Court, and

Now, on this day, the defendant was brought into open Court, upon the verbal order of the Court, in the Custody of the Marshal, to receive and abide the judgment of the Court herein, whereupon he was called before the bar of the Court, and enquired of if he had anything to say why judgment should not be pronounced against him, and there being no good and sufficient cause shown why judgment should not be pronounced against him;

It is Thereupon, Now During the Same Term of the Court, Considered, Ordered and Adjudged by the Court, by reason of the Verdict of Guilty "Without Capital Punish-

ment" herein, That the said defendant, Hugh A. Bowen, alias Henry Boss, now present in Court, be imprisoned in such Penitentiary as the Attorney General of the United States, or his authorized representative may designate, for and during the remainder of his natural life, and that the execution of said sentence shall commence to run from the date the defendant is committed to jail, or other place of detention to await transportation to the place at which this sentence is to be served.

In Open Court, this the 16th day of February, A. D., 1933.

E. Marvin Underwood, U. S. Judge.

I, Jon Dean Steward, Clerk of said Court, do hereby certify that the above is a true copy of the original sentence, in the case stated, as appears of record in my office.

Witness my hand and the seal of said Court, at Rome, Georgia, this the 16th day of February, A. D., 1933.

(Signed) Jon Dean Steward, Clerk, U. S. District Court, Northern Dist. of Ga.

[fol. 55] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE ROME DIVISION OF THE NORTHERN DISTRICT OF GEORGIA, NOVEMBER TERM, A. D. 1932

To the United States Marshal for the Northern District of Georgia, Atlanta, Georgia, Greeting:

You are hereby commanded to receive and commit to the custody of the Attorney General of the United States, or his authorized representative, the body of Hugh A. Bowen, alias Henry Boss, charged with, and convicted, in said Court of Violation of Section 273 of the Penal Code of the United States, to-wit:

"Murder on Government Reservation",

to be safely kept until thence delivered by due process of law.

Witness the Honorable E. Marvin Underwood, Judge of the District Court of the United States for the Northern District of Georgia, and the Seal of the said District Court, at Rome, Georgia, this the 16th day of February, A. D. 1933.

(Signed) Jon Dean Steward, Clerk, U. S. District Court, Northern Dist. of Ga.

UNITED STATES DISTRICT COURT FOR THE ROME DIVISION OF THE NORTHERN DISTRICT OF GEORGIA, NOVEMBER TERM, 1932

No. 2579

THE UNITED STATES

vs.

HUGH A. BOWEN, Alias HENRY BOSS

CATOOSA COUNTY, GEORGIA:

Copy of Sentence and Commitment Dated February 16 A. D., 1933.

Clint W. Hager, United States Attorney.

[fol. 56] A true copy, October 6, 1937. Walter T. Dorington, Record Clerk, U. S. P. Alcatraz, California.

[fol. 57] EXHIBIT "B" TO RETURN

Miscellaneous Form No. 39 (a).
Sanford Bates, Director.

Department of Justice, Bureau of Prisons, Washington

Per Transfer Order #1748.

To the Warden of U. S. Penitentiary Annex, Ft. Leavenworth, Kansas, or his duly authorized representative; and to the Warden of the U. S. Penitentiary, Alcatraz Island, California:

Whereas, in accordance with the authority contained in Section 7 of the Act approved May 14, 1930 (46 Stat. 325) the Director of the Bureau of Prisons for the Attorney General has ordered the transfer of Hugh A. Bowen, #5332 from the U. S. Penitentiary Annex, Ft. Leavenworth, Kansas, to the U. S. Penitentiary at Alcatraz Island, California.

Now Therefore, you the Warden of the U. S. Penitentiary Annex, at Ft. Leavenworth, Kansas, are hereby authorized and directed to execute this order by causing the removal of said prisoner together with the original writ of commitment and other official papers to the said U. S. Penitentiary at Alcatraz Island and to incur the necessary expense and include it in your regular accounts.

And you the Warden of the U. S. Penitentiary at Alcatraz Island are hereby authorized and directed to receive the said prisoner into your custody and him safely keep until the expiration of his sentence or until he is otherwise discharged according to law.

For the Attorney General.

(Signed) Sanford Bates, Director.

(Date:) Aug. 15, 1934.

A true copy, October 6, 1937. Walter T. Dorington, Record Clerk, U. S. P. Alcatraz, California.

Original to be left at institution to which prisoner is transferred.

(Here follows one photolithograph, side folios 58-59)

58-69

EXHIBIT "C" To return

RECORD OF COURT COMMITMENT
UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

Original for Central File

Inst. Name BOWEN, Hugh A. No. 173-AZ

Alias Henry Boss Color White Age 32

True Name Hugh A. Bowen Name and number of prior commitments to Fed. Inst. Hugh A. Bowen, #42891, Atlanta, Ga
" " " #5332, Leavenworth Annex.
" " " USH, Springfield

Offense MURDER (Gov't Reserv.)

District N/Ga., - Rome

Sentence LIFE Costs Fines XXX Committed XX Not Committed Paid
Committed Not Committed Paid

Sentence changed New term Reason therefor

Sentenced February 16, 1933 When arrested Feb. 12, 1931

Committed to Fed. Inst. Mar. 27, 1933 Where arrested Centralia, Wash.,

Sentence begins Feb. 16, 1933 Residence Lafayette, Ga.

Eligible for parole Feb. 15, 1948 Time in jail before trial From arrest

Eligible for conditional release with good time Rate per mo. good time Total good time possible

Eligible for con. rel. with extra good time

A TRUE COPY, Oct. 6, 1937
WALTER F. DORINGTON
Record Clerk, USP Alcatraz

Forfeited good time Amount forfeited

Restoration good time Amount Restored

Expires full term LIFE

Former Commitments on Sentence to Other Institutions

No.	Name of Institution	Location
42891	USP	ATLANTA, GA.
?	USHosp	SPRINGFIELD, Mo.
5332	USP	LEAVENWORTH ANNEX Ft. Leav. Kansas

(Transferred to Alcatraz, Sept. 4, 1934)

Person to be notified in case of Serious illness or death

NAME WILLIAM BOWEN

RELATION TO PRISONER FATHER

ADDRESS LAFAYETTE, GEORGIA

TELEPHONE

[fols. 60-63] Memorandum of points and authorities against petition for writ of habeas corpus omitted in printing.

[fol. 64] In United States District Court

[Title omitted]

Minute Entry of Submission—October 9, 1937

This cause came on regularly this day for hearing on the Order to Show Cause as to the issuance of a Writ of Habeas Corpus. No appearance was made by the Attorneys for the petitioner. A. J. Zirpoli, Esq., Assistant United States Attorney, appeared on behalf of James A. Johnston, Warden of the United States Penitentiary at Alcatraz, California, and filed said Respondent's Return to the Order to Show Cause. On motion of Mr. Zirpoli, it is ordered that the Petition for Writ of Habeas Corpus be, and the same is hereby submitted.

[fol. 65] In United States District Court

No. 22539-L

In the Matter of H. A. Bowen, on Habeas Corpus

Order Denying Petition for Writ of Habeas Corpus—October 11, 1937

The Petition for Writ of Habeas Corpus having been submitted and due consideration having been thereon had, it is Ordered that said Petition be and the same is hereby Denied.

[fol. 66] Motion for leave to file and docket transcript and proceed in forma pauperis omitted in printing.

[fols. 67-68] Affidavit of forma pauperis omitted in printing.

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed January 7, 1938

Comes Now Hugh Allen Bowen, in the above-entitled cause and respectfully shows to this Honorable Court that on the 11th day of October 1937 A. D. a final judgment was rendered and entered of record, disallowing the Petitioner's Writ of Habeas Corpus and refusing to issue said Writ to all of which action and ruling of the court Petitioner was allowed an exception.

That in said action and ruling of the court and the judgment and proceedings errors were committed to the harm and prejudice of Petitioner, all of which will appear in detail in the assignment of errors hereto attached.

Wherefore, Petitioner prays that an appeal be allowed from such action, ruling and final judgment to the Circuit Court of Appeals for the Ninth Judicial Circuit and;

Your Petitioner prays that a transcript of records and proceedings and papers upon which such order was made duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit at San Fran-
[fol. 70] cisco, California.

Hugh Allen Bowen, Pro Se, Petitioner and Appellant.

[fol. 71] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed January 7, 1938

Comes Now Hugh Allen Bowen on this 11th day of December, 1937 A. D. in the above-entitled action and says that in the record and proceedings aforesaid, there is manifest errors in this, to-wit:

1st

The United States District Court (supra) erred in failing to hold that Indictment No. 2579 failed in any manner, form or substance to charge your Petitioner, Hugh Allen Bowen with any offense whatever against the laws of the United States of America.

2nd

The United States District Court of the Northern District Southern Division, at San Francisco, California, erred in denying the application for Writ of Habeas Corpus.

3rd

The United States District Court (supra) erred in holding that the judgment was valid, in cause No. 2579.

4th

The United States District Court (supra) erred in fail-
[fol. 72] ing to hold the Commitment in Cause No. 2579 (supra) was invalid therefore null and void.

5th

The United States District Court (supra) erred in failing to produce the body of Petitioner as provided under and by Section 458 Title 28 of the United States Code.

Wherefore Petitioner prays that the order and judgment aforesaid be reversed, annulled and held for naught and your Petitioner go hence without day and mandate issue forthwith and for such other relief as may be proper in the premises.

Hugh Allen Bowen, Pro Se, Appellant.

[fol. 73] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed January 7, 1938

Appeal allowed this 7th day of January, 1937.

It is further ordered that said Petitioner be and he is hereby allowed to prosecute said appeal in forma pauperis.

Harold Louderback, United States District Judge.

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed January 7, 1938

To the Honorable Clerk of Said Court:

You are hereby requested that under the ruling of the Court, you prepare a transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeal, for the Ninth Circuit, San Francisco, California, under notice of appeal from the foregoing court, and to include:

1. Petition for Writ of Habeas Corpus
2. Response
3. Order denying Writ of Habeas Corpus
4. Notice of Appeal
5. Petition for appeal
6. Assignment of Errors
7. Order allowing appeal
8. Praecipe of Transcript.

Hugh Allen Bowen, Pro se, Petitioner.

[fol. 75] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 76] Citation, in usual form, showing service on Frank J. Hennessey, filed January 11, 1938, omitted in printing.

[fol. 77] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8753

ORDER OF SUBMISSION—May 12, 1938

Ordered appeal in above cause submitted to the Court, upon motion of Mr. A. J. Zirpoli, Assistant United States Attorney, counsel for appellee, on briefs on file; that said counsel is hereby granted leave to file copy of Statutes of Georgia and Federal Statutes involved in this cause.

[fol. 78] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8753

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—June 27, 1938

By direction of the Court, Ordered that the typewritten opinion rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 79] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8753

HUGH ALLEN BOWEN, Appellant,

vs.

JAMES A. JOHNSTON, Warden of the United States Penitentiary Alcatraz Island, Appellee

Upon Appeal from the District Court of the United States for the Northern District of California

OPINION—Filed June 27, 1938

Before Garrecht, Haney and Stephens, Circuit Judges

STEPHENS, Circuit Judge:

This is an appeal from an order of the United States District Court for the Northern District of California denying appellant a writ of habeas corpus.

The facts are not in dispute. Appellant is confined in the United States prison at Alcatraz Island, California, under restraint of defendant, the prison warden. He was indicted Dec. 14, 1930; convicted of murder under the provisions of § 273 of the Penal Code of the United States [18 U. S. C. A., § 452]; sentenced to life imprisonment by the United States District Court of Georgia for the Northern Division; and transferred from an eastern prison to Alcatraz by order of the Attorney General.

The indictment, upon which appellant was tried and convicted, charged him, together with John E. Smith and Frank Bowen, with shooting one Raymond Kington to death with a shot gun within the Rome Division of the Northern District of Georgia "within the jurisdiction of said court, and within a certain place and on certain lands reserved and [fol. 80] acquired for the exclusive use of the United States and under exclusive jurisdiction thereof, and acquired by the United States by consent of the legislature of the State of Georgia, to-wit: Chickamauga and Chattanooga National Park, sometimes known as Chickamauga and Chattanooga National Military Park, in said State of Georgia * * *."

Appellant's principal claim is that the District Court in which he was tried had no jurisdiction over the Park in which it is alleged the crime was committed for the reason that jurisdiction over such area could not constitutionally have been ceded to the United States and in fact was not so ceded, and that the indictment is defective in not alleging the details of such cession to the United States by the State of Georgia.

In Archer v. Heath, 30 Fed. (2d) 933 (C. C. A. 9, 1929), the court said:

"Where a judgment of a United States Court is attacked directly by appeal, the judgment will be reversed, unless the jurisdictional facts appear some place in the record; but on a collateral attack, such as by habeas corpus, the judgment is presumptively valid, unless it appears affirmatively from the record that the court was without jurisdiction. This distinction has been repeatedly recognized by the Supreme Court, and it has been universally held that a petitioner is not entitled to a discharge on habeas corpus simply because the record of conviction fails to show affirmatively the jurisdiction of the court in which the conviction was had. Ex parte Cuddy, 131 U. S. 280, 9 Sup. Ct. 703, 33 L. Ed. 154; United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; Knewel v. Egan, 268 U. S. 442, 45 Sup. Ct. 522, 69 L. Ed. 1036." [Page 933.]

In Walsh v. Archer, 73 Fed. (2d) 197 (C. C. A. 9, 1934), an habeas corpus proceeding, the petitioner contended that the alleged murder was not committed on the high seas on board a vessel but rather within the State of California

and within the jurisdiction of the courts of that State. This court said:

"Whether the location of the alleged crime was upon the high seas and exclusively within the jurisdiction of the United States required consideration of many facts and seriously controverted questions of law, including the alleged error involving the jurisdiction of the court. [fol. 81] "If petitioner's contention be true, then every person serving a sentence for an offense alleged to have been committed on the high seas, within the limits of an Indian reservation, national forest, or elsewhere upon lands exclusively within the jurisdiction of the United States, could claim the right to a hearing on habeas corpus by alleging in his petition that the trial court was without jurisdiction, thus retrying on habeas corpus one of the issues of fact required in every such case to be passed upon by the trial court and the jury * * *" [Page 199.]

In that case the court decided that, where the lack of jurisdiction does not appear affirmatively on the face of the record, such matters of law and fact are for the determination of the trial court and cannot be questioned on habeas corpus.

The indictment, in the case before us, recites that the jurisdiction of the United States over appellant is predicated upon the fact that the alleged crime was committed "within a certain place and on certain lands reserved and acquired for the exclusive use of the United States and under exclusive jurisdiction thereof, and acquired by the United States by consent of the legislature of the State of Georgia, to-wit: Chickamauga and Chattanooga National Park * * *." The question then arises, "Does the record affirmatively show that the United States was without jurisdiction?" Had the indictment gone no further than the phrase "and acquired by the United States by the consent of the legislature of the State of Georgia" and not added the words "to-wit: Chickamauga and Chattanooga National Park * * *," the question would undoubtedly have to be answered in the negative. It is argued that the addition of the latter phrase rendered the indictment fatally defective—it being asserted that the United States has no jurisdiction over the Chickamauga and Chattanooga National Park. But if the United States could constitu-

tionally acquire jurisdiction over the Park, then the question whether in fact the United States did have such jurisdiction over the Park and over the appellant becomes a seriously controverted question of law and fact within the meaning of Walsh v. Archer, supra, and it is not within our province to question this on habeas corpus. The record in this case does not disclose a lack of jurisdiction in the United [fol. 82] States unless it can be said that the United States is without power to exercise jurisdiction over a national park because lacking constitutional power to accept a cession thereof, with, of course, all of its incidents.

The recent case of Collins v. Yosemite Park and Curry Co., — U. S. — (decided by the Supreme Court May 31, 1938), removes all doubt as to this problem. In that case the parties contested the validity of a cession of exclusive jurisdiction by the State of California to the United States over Yosemite National Park (reserving to the State certain powers to serve process and to tax). In answering the contention that the United States could not constitutionally accept such cession, the court said:

"There is no question about the power of the United States to exercise jurisdiction secured by cession, though this is not provided for by Clause 17. [Of Art. 1, § 8 of the Federal Constitution.] [Citing cases.] And it has never been necessary, heretofore, for this Court to determine whether or not the United States has the constitutional right to exercise jurisdiction over territory, within the geographical limits of a State, acquired for purposes other than those specified in Clause 17. It was raised but not decided in Arlington Hotel Co. v. Fant, 278 U. S. 439, 454. It was assumed without discussion in Yellowstone Park Transportation Co. v. Gallatin County, 31 Fed. (2d) 644.

"* * * It is necessary to determine that question here. The United States has large bodies of public lands. These properties are used for forests, parks, ranges, wild life sanctuaries, flood control, and other purposes which are not covered by Clause 17. * * * No question is raised as to the authority to acquire land or provide for national parks. As the national government may, 'by virtue of its sovereignty' acquire lands within the borders of states by eminent domain and without their consent [citing James v. Dravo Contracting Co., 302 U. S. 134 and Kohl v. United States, 91 U. S. 367, 371, 372], the respective

sovereignities should be in a position to adjust their jurisdictions. There is no constitutional objection to such an adjustment of rights. * * *." [Page —.]

[fol. 83] Upon the authority of the foregoing, the question whether or not the United States could have had jurisdiction over the Chickamauga and Chattanooga National Military Park and over the appellant must be answered in the affirmative.

It is also contended that the indictment is defective in not describing with particularity the place of commission of the crime. We do not so hold, but even if it is such a question cannot be raised on habeas corpus. In Campbell v. Aderhold, 67 Fed. (2d) 246 (C. C. A. 5, 1933), the court said:

"We think the indictment fairly and naturally read does fail to charge the place of the crime and would have been bad on demurrer and probably on motion in arrest of judgment. In all such proceedings taken before the judgment becomes final, it is the duty of the court to scrutinize its record to be sure that it serves its purposes to inform the defendant fully of the charge against him, to confine the trial to that charge, and to indentify it as a protection against future double jeopardy. But when the defendant suffers a doubtful record to become final he may not freely criticize it in an indirect attack upon it. He is ordinarily conclusively bound by it on habeas corpus and may not contradict what it expressly asserts. Riddle v. Dyche, Warden, 262 U. S. 333, 43 Sup. Ct. 555, 67 L. Ed. 1009." [Page 246.]

This is a complete answer to appellant's contention.

Appellant also argues that the indictment does not charge that he committed a crime against the United States. The principal argument upon this point is that as three persons were charged, all three could not be guilty of murdering one man with one shot gun. The case of St. Clair v. United States, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936 (1894), disposes of this claim. In that case the Supreme Court, in answering a like contention, said:

"Equally without merit is the objection that the indictment does not show which one or more of the defendants committed the alleged assault. The indictment charged that the defendants, St. Clair, Sparf and Hansen, acting

jointly, killed and murdered Fitzgerald. The offense was one which, in its nature, might be committed by one or [fol. 84] more of the defendants. Proof of the guilt of either one would have authorized his conviction, and the acquittal of the others." [Page 1007 of 14 Sup. Ct.]

That the word "felony" or "feloniously" was not used in the charging part of the indictment avails the appellant nothing. In Myres v. United States, 256 Fed. 779 (C. C. A. 5, 1919), the court said:

"The plaintiff in error lastly criticizes the indictment because it does not charge that the offense was feloniously committed. The crime of murder under the federal law is defined by statute to be 'the unlawful killing of a human being with malice aforethought.' In defining murder in the first and second degree, and also manslaughter, the Penal Code does not make use of the word 'feloniously.' The offense being created and defined by statute, and the statute not using the word 'feloniously' in defining the crime, the indictment need not charge that it was done feloniously."

The other objections urged by the appellant are wholly insufficient in point of law and call for no discussion.

The order of the District Court is affirmed.

[File endorsement omitted.]

[fol. 85] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8753

HUGH ALLEN BOWEN, Appellant,

vs.

JAMES A. JOHNSTON, Warden of the U. S. Penitentiary, Alcatraz, Appellee

JUDGMENT—Filed June 27, 1938

Appeal from the District Court of the United States for the Northern District of California, Southern Division

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for

the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

[File endorsement omitted.]

[fol. 86] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 87] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to the question of the jurisdiction of the District Court on habeas corpus.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: In forma pauperis. Enter Hugh Allen Bowen, pro se. File No. 42,844. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 359. Hugh Allen Bowen, petitioner, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz, California. Petition for a writ of certiorari. Filed September 16, 1938. Term No. 359, O. T., 1938.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 359

HUGH ALLEN BOWEN,

Petitioner,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HUGH ALLEN BOWEN,
Pro Se.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 359

HUGH ALLEN BOWEN,

Petitioner,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA.

PETITION.

Hugh Allen Bowen, *in proper persona,* prays that a writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit Court of Appeals for the Ninth Circuit entered in the above cause on June 27, 1938, affirming the judgment of the United States District Court for the Northern District of California:

Summary of Statement of Matter Involved.

The petitioner filed his petition for the writ of *habeas corpus,* complaining of his detention in the Federal Penitentiary in Alcatraz, California, alleging that he was held in violation of his constitutional rights. He was arrested by

the sheriff of Hamilton County, Tennessee, on February 12, 1931, together with one John E. Smith, charged with the murder under the laws of the State of Georgia, and placed in the Hamilton County jail. It was alleged that said crime was committed within the limits of the Chickamauga and Chattanooga National Park in the State of Georgia.

Petitioner contended that he was not a fugitive from the State of Georgia, and filed a writ of *habeas corpus* in the Hamilton County Court, demanding his release. The case was heard by the Honorable L. D. Miller. At the hearing were officials from the State of Georgia, and the Superintendent of the Chickamauga and Chattanooga National Park, with maps, the laws of Georgia and of the United States, and other papers, to show that the State of Georgia had exclusive jurisdiction over the crime, and that the United States did not have such jurisdiction.

Judge Miller, after due consideration, ruled that the State of Georgia had exclusive jurisdiction over crimes committed within the boundaries of the Park, and ordered petitioner removed to the State of Georgia, to be tried under State laws. Whereupon petitioner appealed to the Tennessee State Court of Appeals. He remained in jail ten months pending the outcome of this appeal, when the United States indicted and took him to Atlanta, Georgia, to await trial. He remained in the Atlanta County jail another fourteen months before he was tried. He urged every United States Marshal and every other person who visited the jail to ask the judge and District Attorney to give him a preliminary hearing, that he might know the nature of the offense charged against him. But at no time was he given a hearing of any nature whatsoever.

Petitioner was utterly without funds, but his Mother employed one M. Neal Andrews, an attorney of questionable legal training, to defend both the petitioner and his brother, Frank Bowen, who were jointly charged in the indictment.

John E. Smith was tried separately, convicted, and sentenced to life imprisonment.

Petitioner took a pauper's oath as a means to obtain witnesses in his own behalf and to get the court to furnish a stenographer to take the record in order that he might appeal the case, as provided for in Section 832 of Title 28, U. S. C. A.

On the morning of February 6, 1933, petitioner and Frank Bowen were taken to the Federal court room in Rome, Georgia, and the trial proceeded. The petitioner was not informed of the nature of the charge against him until after the trial was underway, when he asked the court if he were being tried for first degree murder, or for manslaughter. The court replied that it was for first degree murder and that thereafter all inquiries made on behalf of petitioner should be directed to the court by defense counsel. Petitioner then had his attorney ask the court if a stenographer were present to take the record. The court stated that inasmuch as petitioner was prosecuting the case as a pauper, the court could not feel justified in putting the Government to the additional expense of hiring a reporter to maintain the record.

Petitioner produced testimony by two surveyors to show that the crime was not committed within the limits of the Park, that the deceased's body was found more than two hundred (200) yards from the nearest bound of the Park. No testimony was offered by the Government to refute these statements. However the court instructed the jury to the effect that, inasmuch as the indictment alleged that the crime was committed within the boundaries of the Park, it should disregard the expert testimony, and so find that the United States had jurisdiction over the offense.

The Government used as a witness against petitioner, one Estell Roddy, who admitted that he was then at liberty on bail pending the outcome of an indictment for per-

jury under the laws of the State of Georgia. Petitioner took an exception to the admission of his testimony, as well as the above named part of the court's instruction to the jury. The petitioner was convicted wholly and entirely on circumstantial evidence. Not one scintilla of substantial evidence was introduced on the part of the United States.

The jury found petitioner guilty and acquitted his brother, Frank Bowen. After the court passed sentence against petitioner, his attorney served notice of appeal and told petitioner that he, the attorney, would take care of the appeal, and told the petitioner to go on ahead to the penitentiary and "don't worry about it". Petitioner was taken to the penitentiary and was quarantined in a tubercular ward of the prison hospital, away from the other inmates. He remained in this ward all the time he was in the Atlanta Penitentiary.

Petitioner had had only a fifth grade education, had never been arrested before for any crime or misdemeanor whatsoever, and had not the slightest knowledge as to what procedure to pursue in effecting his appeal. He was allowed to write to his Mother, but not to his attorney. His Mother wrote to the attorney numerous times, but he would make no reply to her letters.

Thirty days before appeal time elapsed, petitioner's Mother made an expensive trip to see Attorney Andrews regarding the appeal. Attorney Andrews told her that, to be frank about the matter, he was making a strong bid for appointment as an assistant United States District Attorney, that if he insisted on carrying out the appeal, it would greatly endanger his chance of getting the appointment, and that he suggested she engage some other attorney to proceed with the appeal. She told him that she was without funds or any other means of employing another attorney. He told her to go on back home and he would see what could be "done about it".

Two weeks after the time elapsed for taking the appeal, petitioner's Mother made another expensive trip of a hundred and fifty miles to see Attorney Andrews about the case, and he told her that he did everything possible within his power to appeal the case, but that no record of the testimony had been kept, and that there was absolutely nothing on which he could base an appeal.

Petitioner was later transferred to the Federal Hospital for Delinquents at Springfield, Missouri, from there to the Fort Leavenworth, Kansas, Penitentiary, hence to Alcatraz Prison, his present place of confinement.

Petitioner filed his petition for the writ of *habeas corpus* (No. 22539-L) on September 25, 1937, in the District Court for the Northern District of California, and on October 9, 1937, the writ was denied. Petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit, and the decision of the District Court was affirmed on June 27, 1938.

The Circuit Court of Appeals in the opinion it returned stated:

> "Appellant's principal claim is that the District Court in which he was tried had no jurisdiction over the Park in which it is alleged the crime was committed • • • and that the indictment is defective in not alleging the details of such cession to the United States by the State of Georgia." Citing *Archer* v. *Heath*, 30 F. (2d) 933 (C. C. A. 9, 1929).

The Circuit Court of Appeals further stated:

> "But if the United States could constitutionally acquire jurisdiction over the park, then the question whether in fact the United States did have such jurisdiction over the Park and over the Appellant becomes a seriously controverted question of law and fact within the meaning of *Walsh* v. *Archer*, 73 F. (2d) 197 (C. C. A. 9, 1934), *supra*, and it is not within our province to question this on *habeas corpus*."

The Circuit Court of Appeals further stated in referring to petitioner's contention that he was deprived of due process of law in that he was denied the right to appeal, that he had the right to a preliminary hearing, and to be informed of the nature of the crime and to be confronted with the witnesses against him.

> "The other objections urged by the appellant are wholly insufficient in point of law and call for no discussion."

Reason for Granting the Writ.

1. The decision of the Circuit Court of Appeals in the case at bar involves important questions of constitutional law and of the State's rights. Such decisions of this Court as discuss the right of an accused to a speedy trial, to be confronted with the witnesses and to be informed of the accusation against him, and depriving him of life and liberty without due process as guaranteed by the 5th and 6th Amendments of the Constitution, indicated that the decision of the Circuit Court of Appeals in holding that the writ of *habeas corpus* will not lie, is in direct conflict with the applicable decisions of this Court, particularly the cases of *Johnson* v. *Zerbst* (decided by this Court May, 1938); *Mooney* v. *Holohan*, 294 U. S. 103; *Powell* v. *Alabama*, 287 U. S. 45; *Brown* v. *Mississippi*, 297 U. S. 278.

2. The decision of the Circuit Court of Appeals, while not specifically holding that a State could not qualify jurisdiction in its cession of land within its boundaries to the United States, it left such an inference, and is probably not in harmony with the recent case of *Collins* v. *Yosemite Park and Curry Co.* (decided by this Court May 31, 1938), and the cases of *Kohl* v. *U. S.*, 91 U. S. 367; *James* v. *Dravo Contracting Company*, 302 U. S. 134, 146, 58 Sup. Ct. 208, 214, 82 L. Ed. 114, A. L. R. 318; *Fort Leavenworth R. Co.* v. *Lowe*, 114 U. S. 525, 541, 5 Sup. Ct. 995, 29 L. Ed. —.

3. The decision of the Circuit Court of Appeals that where there is doubt as to whether or not the Court has jurisdiction over the crime, but it appears from the record by averment, intendment, and implication that the court did have jurisdiction, though such jurisdiction was expressly and specifically reserved to the State by the act of cession by the Legislature thereof, and came before the Circuit Court of Appeals for consideration, that the record can not be examined on *habeas corpus*, is probably in conflict with *Johnson* v. *Zerbst, supra*, and *U. S.* v. *Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631, and others, and in direct conflict with the Tenth Amendment of the Constitution.

4. The decisions of this Court which discuss the language of an indictment in charging the offense and describing with particularity the time, manner, and place of commission of the crime, especially where jurisdiction is involved, indicates that the decision of the Circuit Court of Appeals; *Campbell* v. *Aderhold*, 67 F. (2d) 246 (C. C. A. 5, 1933); and *Myers* v. *United States*, 256 Fed. 779 (C. C. A. 5, 1919), are probably in conflict with the applicable decisions of this Court, particularly *U. S.* v. *Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; *U. S.* v. *Cruikshank*, 92 U. S. 542; and *U. S.* v. *Simmons*, 96 U. S. 360.

Whether the decision of the Circuit Court of Appeals is based upon the theory that the petitioner was not deprived of due process of law and the right to a speedy trial, to be informed of the nature of the crime and to be confronted with the witnesses against him, as guaranteed by the Constitution, or whether the decision is based upon the proposition that such deprivations were of such slight degree as not to warrant interference with the void sentence through the process of *habeas corpus* (the only way open to petitioner when denied the right of appeal), or whether upon the theory that the United States District courts can exercise

jurisdiction over criminal and other process within a State, when jurisdiction over such process is expressly and specifically reserved by the State, it is submitted that the decision is in conflict with the principles of justice as announced by this Court in the cases cited in that it deprives petitioner of the right of appeal (due process) and other rights as guaranteed by the Fifth and Sixth Amendments of the Constitution, and encroaches upon the prerogatives of State rights, as laid down by the Tenth Amendment of the Federal Constitution.

WHEREFORE petitioner respectfully prays that the petition be granted.

HUGH ALLEN BOWEN,
Petitioner-Appellant,
In Proper Persona.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

There was no reported opinion of the District Court. The opinion of the Circuit Court of Appeals is printed at pages 79-84 of the record.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on June 27, 1938. Jurisdiction to issue the writ requested is found in the provisions of Section 240 (A) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case.

A statement of the case will be found in the petition.

Specification of Error.

Petitioner contends that the Circuit Court of Appeals erred:

1. In holding that the United States had jurisdiction over the offense allegedly committed by the petitioner.

2. In failing to hold that the petitioner was denied "due process".

3. In failing to hold that the bill of indictment is so fatally defective that it is insufficient to charge any offense against the United States.

4. In not reversing the judgment of the trial court and releasing petitioner as prayed for in his petition for writ of *habeas corpus*.

ARGUMENT.

The trial and conviction of the petitioner deprived him due process of law and of the right to a speedy and public trial in violation of Fifth and Sixth Amendments of the Constitution, such trial and conviction being under the color of authority usurped from the sovereign powers of the State of Georgia, in violation of the Tenth Amendment of the Constitution of the United States.

The Fifth Amendment provides that, "No person shall be * * * deprived of life, liberty, or property, without due process of law." The Sixth Amendment declares that, "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor * * *." The Tenth Amendment declares, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

Whatever might have been the Court's opinion prior to *Johnson* v. *Zerbst*, 58 Sup. Ct. 1019, it was by that decision established that abandonment or waiver of "fundamental constitutional rights" by force or by ignorance could not be "acquiesced in by the Supreme Court of the United States. The refusal by the trial court to provide for the keeping of the record in a trial for a capital offense is tantamount to denying the accused witnesses in his favor the right of appeal, and of the assistance of counsel, within the meaning of *Powell* v. *Alabama*, 287 U. S. 45, where a "mere pretense" was substituted for a trial.

The widely controverted question as to the power of the United States to exercise jurisdiction over land acquired by cession was unmistakably settled by the case of *Collins* v.

Yosemite Park and Curry Co., 58 Sup. Ct., page 1013, where the Supreme Court said:

> "Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a matter of arraingment. These arraignments the courts will recognize and respect."

The issue of whether the petitioner in the instant case was deprived of his constitutional rights is therefore presented under the Fifth and Sixth Amendments, and upon the facts of the instant case it must be held, it is submitted, he was deprived of those rights.

When the petitioner first was arrested, the Federal authorities contended that they had no jurisdiction to try him in the Federal courts, and worked in concert with the prosecuting officials of the State of Georgia to show that the State had exclusive jurisdiction, in order to effect petitioner's return on extradition to the State of Georgia, for trial under its laws. But ten months later, when the State disclosed that there was insufficient evidence to support a conviction, the United States sought and obtained an indictment against petitioner, and took him into custody.

He had been already in jail ten months, and he waited another fourteen months in Federal custody without any manner of preliminary examination whatsoever, and was not informed of the crime against him, until the day he was taken to trial, and after the trial was underway. Under the Sixth Amendment and Section 562 of the U. S. Criminal Code Act of Congress April 30, 1790, which later provides that, "* * * When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial," petitioner was entitled to these rights set forth therein. There could be no due process without them.

Because petitioner was without funds he made oath *in forma pauperis,* in order to obtain witnesses in his favor, and to get the court to furnish a stenographer to keep the record. The court denied this request, thereby depriving the petitioner of his right to appeal and prosecute to finality his cause under the pauper affidavit, as provided for in Section 832 of Judicial Code, amended by Act of Congress January 31, 1928.

It is just as well that the court refused to allow the witnesses to testify for the petitioner, because when the trial ended, the case ended, for there was nothing for a superior court to review. But even if an orderly appeal had been open, petitioner could not have appealed, because his attorney "sold him out" in exchange for appointment as Assistant U. S. District Attorney. This may well come under the case of *Brown* v. *Mississippi,* 297 U. S. 278. In that case, the accused had been convicted upon the confessions obtained by third-degree methods, and his constitutional right against self incrimination was thus denied. The accused was represented by counsel and it was contended that failure by counsel to move for the exclusion of the confessions, operated as a waiver of the constitutional right against self incrimination. The Supreme Court held that the denial of this right was not a mere error which could be thus waived by the attorney for the accused, but was an error which rendered the trial a nullity. Mr. Justice Hughes said, at page 286:

> "That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceedings a mere pretense of a trial and rendered the conviction and sentence wholly void. Moore *v.* Dempsey, *supra.*"

In all capital, as well as non-capital, cases, the record of the trial must be preserved. In *Johnson* v. *Zerbst, supra,* the court said, at page 1023:

> "While an accused may waive the right to counsel, whether there is a proper waiver should be determined by the trial court, and it would be fitting and proper for that determination to appear upon the record."

The court further states,

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right and privilege."

The petitioner in the instant case did not intentionally waive his right of appeal; he did everything within his feeble power to persuade the court to maintain the record, that he might have something upon which to base an appeal.

Petitioner believes that under the Sixth Amendment he was entitled to a preliminary hearing. Foster Federal Practice (6th Ed., 1921), Vol. 3, p. 2578, states:

> "A person arrested under process of a Federal Court has the right to a preliminary investigation of the charge against him and to proof of probable cause before he is committed to await an indictment or for trial."

Circuit Judge Ward, in *Safford* v. *U. S.* (1918 C. C. A., N. Y.), 252 Fed. 471, 473, said:

> "It would be a scandal to arrest and imprison citizens without giving them a hearing and we would not interfere with this uniform and wholesome practice, except under absolute necessity."

Mr. Justice White said, in *Golosby* v. *U. S.* (1895), 160 U. S. 70, 73, 16 Sup. Ct. 216-218, 40 L. Ed. 343:

> "The contention at bar that, because there had been no preliminary examination of the accused, he was thereby deprived of his constitutional guaranty to be confronted by the witnesses, by mere statement demonstrates its error."

Mr. Hughes, in Federal Procedure (2d Ed.) pp. 32-33, thinks the right of preliminary examination exists in all cases.

Where a case is removed from a State to Federal court, it is incumbent upon the Federal judge to make a thorough examination to determine whether the United States has jurisdiction to try the case.

Said Chief Justice Ellsworth:

> "And the fair presumption is that a cause is without jurisdiction until the contrary appears. This renders it necessary inasmuch as the proceedings of no court can be deemed valid further than its jurisdiction appears, or can be presumed, to set forth upon the record * * * the facts or circumstances which give jurisdiction, either expressly or in such manner as to render them certain by legal intendment." *Scott* v. *Sanford* (1856), 19 How. 393, 401, 402 L. Ed. 691.

There is nothing contained in Section 424, Title 16, Act of Congress, August 19, 1890, giving Federal courts jurisdiction to serve criminal process within the Chickamauga and Chattanooga National Park. On the contrary, the act of cession by the Legislature of the State of Georgia, November 19, 1890, page 199, provides:

> "* * * Provided: that this cession is upon the express condition that the State of Georgia shall so far retain a concurrent jurisdiction with the United States over said lands and roads, as that all civil and criminal process issued under the authority of this State may be executed thereon in like manner as if this Act had not been passed; and Upon the further express conditions, that the State shall retain its civil and criminal jurisdiction over persons and citizens in said ceded territory as over other persons and citizens in the State * * *."

This language is so plain that in no sense of the word should it be misconstrued.

There can be no question about the power of the United States to exercise jurisdiction over land acquired for purposes other than enumerated in Article I, Sec. 8, Clause 17, of the Constitution; and it must be conceded that a State may qualify its cession of jurisdiction over lands ceded to the United States. The recent case of *Collins* v. *Yosemite Park and Curry Co.*, erases all doubt as to this question, when the court said:

> "Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification."

The indictment charged that the crime was committed "in the Rome Division of the District aforesaid, and within the jurisdiction of said Court, and within a certain place and on certain lands reserved and acquired for the exclusive jurisdiction thereof * * * to wit, Chickamauga and Chattanooga National Park * * *". That the said defendants "did then and there unlawfully, wilfully, deliberately and with malice aforethought, upon one, Raymond Kington, a human being make an assault, * * * kill and murder him * * * by shooting and wounding him in the head and neck with a certain loaded shotgun * * * then and there held in the hands of one of the defendants but which particular one of said defendants is to the grand jurors unknown."

"In a certain place" covers an area of 28,000 acres of land, more or less, extending into two (2) counties or more. In *Partson* v. *U. S.*, 20 F. (2d) 127, the court said:

> "The allegation of the place was ineffectual, because it permitted the government to prove an offense anywhere in the large county of St. Louis, and this indictment and a judgment of conviction or acquittal under it would not protect the defendant from another prosecution for the same offense."

In the instant case it was necessary for the indictment to describe by metes and bounds, and by general particulars the place of commission of the crime, in order to show that it was committed within the limits of the Park. For sometimes the question of whether a crime is for State or Federal cognizance may turn upon an exceedingly exact location of the offense, where a man is shot when leaving a postoffice building. A foot may well turn the scale either way, with all the differences thereby involved. Often the question, too, even when the locality is fixed is one of no little difficulty. See, for example, the celebrated *Pothier* Case (1923) (D. C., R. I.), 285 Fed. 632 (1923 C. C. A.), 291 F. 311 (1924), 264 U. S. 399, 44 Sup. Ct. 360, 68 L. Ed. 759.

The petitioner was convicted along with John E. Smith, and since Smith now confesses that he and he alone was guilty, and that petitioner had not even guilty knowledge (see exhibits B and C of transcript) petitioner is entitled to discharge. In *St. Clair* v. *U. S.*, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936 (1894), the court said:

> "The indictment charged that the defendants, St. Clair, Spraf and Hansen, acting jointly, killed and murdered Fitzgerald. The offense was one which, in its nature, might be committed by one or more of the defendants. Proof of the guilt of either one would have authorized his conviction, and the acquittal of the other." (Page 100 of 14 Sup. Ct.)

In that case three men were charged with beating and throwing overboard from a vessel one of their own crew. It is possible for the three men to beat one man and murder him, not so in the instant case. The indictment does not allege a common design or purpose upon the part of three defendants to kill and murder, nor does it allege a conspiracy or unlawful agreement to compass a criminal purpose, nor does it allege any intent or guilty knowledge on

the part of the petitioner. It would not be possible for three men to murder one man with one shotgun. The intent and conspiracy should appear upon the face of the bill of indictment. In *U. S.* v. *Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, Mr. Justice Field used this language:

> "No essential element of the crime can be omitted without destroying the whole pleading."

In *U. S.* v. *Cruikshank*, 92 U. S. 542, the Court said:

> "It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or at statute, includes generic terms it it not suficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must decend to particulars."

The indictment did not sufficiently describe the place of commission of the crime to protect the petitioner from a second conviction for the same offense. The court said: in *U. S.* v. *Burns*, Fed. Reporter, Vol. 54 (page 359):

> "The defendants should be advised more clearly * * * as to the place where it was so done, what was it, and where was it? the evidence must show it, and the District Attorney must be advised as to the place, or the prosecution must fail. Then why should not the defendants be informed? The government does not wish their conviction unless they be guilty, and it should not be permitted to demand their conviction until it has given them a full and fair opportunity to make their defense to a plain and positive charge."

And on page 361:

> "Surely it is not sufficient to say that the offense was committed at the District of West Virginia, at a place on the bank of the Little Kanowka River, and thus permit the United States to offer testimony tending to lo-

cate the place anywhere in five counties, from the source to the mouth of the river."

The Government has convicted and sentenced this petitioner to prison for the rest of his natural life, of an offense which is clearly beyond its jurisdiction, and since the District Court had no jurisdiction over the cause, nor over the petitioner, it follows that any judgment issuing therefrom is null and void.

The court below had jurisdiction to discharge the petitioner on writ of habeas corpus.

The statutes regulating the issuance of writs of *habeas corpus,* so far as here material provide:

> "Power of courts, the Supreme Court and the District Courts shall have power to issue writs of *habeas corpus*". (28 U. S. C. A. Sec. 451.)
>
> "When prisoner is in jail. The writ of *habeas corpus* shall in no case extend to a prisoner in jail unless where he * * * is in custody in violation of the Constitution or of a law or treaty of the United States * * *." (28 U. S. C. A. 453.)

The question presented is whether a judgment of conviction entered in a trial conducted in violation of the requirements of due process of law, and where it is plainly shown upon its face that the court was without jurisdiction to try is such that it "is void and may be questioned collaterally."

It is respectfully submitted that the precise question has been answered in the affirmative by the Supreme Court.

In *Moore* v. *Dempsey,* 261 U. S. 86, the prisoners had been sentenced after a trial dominated by a mob. The trial court had jurisdiction of the offense and the accused, but the Supreme Court held that the mob domination of the trial deprived the prisoners of their liberty without due process of

law, and reversed the order of the lower court, dismissing a petition for *habeas corpus*.

Moore v. *Dempsey* was followed by the Circuit Court of Appeals for the Fifth Circuit, in *Downer* v. *Dunaway*, 53 F. (2d) 586, in which it was agreed that, although the trial had been dominated by a mob, the remedy of the petitioner was by a motion for a new trial or appeal from the conviction, and not by *habeas corpus*. The Circuit Court of Appeals overruled this argument upon the ground that the failure of counsel appointed by the court for the prisoner to move for a new trial because of fear of mob violence was a failure of the corrective process of the court.

In the instant case the attorney was not dominated by any fear of a mob; he was dominated by a different type of fear—The fear that he would not be appointed an Assistant District Attorney. But he gained the appointment, and petitioner lost his right of appeal.

The analogy between deprivation of liberty without due process of law through mob domination and similar deprivation through the denial of the right to appeal and to the assistance of counsel in preparing it, was recognized by the Supreme Court in *Powell* v. *Alabama, supra*, in which it was held that:

> "• • • a defendant charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that would not be proceeding in the calm spirit of regulated justice, but to go forward with the haste of the mob." (287 U. S. at page 59.)

Now it might narrowly be construed that in the instant case there are no characteristics of mob domination discernible. But the principle announced by this Court in the cases of *Mooney* v. *Holohan*, 294 U. S. 103, and *Brown* v. *Mississippi*, 297 U. S. 278, has given the matter a broader construction. In neither of those cases was there present

any of these circumstances of mob domination, but the court nevertheless held that upon the showing of the facts there asserted, the trial in each instant was a "mere pretense." In fact the court there grouped the several different types of circumstances together and classified them all as a deprivation of constitutional right which made the trial nullity as was said by the court:

> "* * * Nor may a State through the acts of its officers, contrive a conviction through the pretense of a trial which, in truth, is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."

There is nothing conclusive that perjured testimony was committed in the instant case, but where a witness admits under oath that he is at liberty on bail under an indictment for perjury, there exists strong indications that perjured testimony was present.

In *Johnson* v. *Zerbst*, 58 Sup. Ct. (on pages 1024-25), Mr. Justice Black said in commenting upon *habeas corpus*:

> "* * * it is open to the courts of the United States, upon an application for a writ of *habeas corpus*, to look beyond forms and inquire into very substance of the matter * * *. To deprive a citizen of his only effective remedy would not only be contrary to the rudimentary demands of justice, but destructive of a constitutional guaranty specifically designed to prevent injustice * * * The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may be released on *habeas corpus*."

In *Ex parte Lange*., 18 Wall. 163, 21 L. Ed. 872, Mr. Justice Miller said in delivering the opinion of the court:

> "The authority of the court in such a case, under the constitution of the United States, and the fourteenth section of the judicial Act of 1789, to issue this writ,

and to examine the proceedings in the inferior court, so far as may be necessary to ascertain whether that court had exceded its authority, is no longer an open question. While therefore, it is true that a writ of *habeas corpus* cannot generally be made to subserve the purpose of a writ of error, yet when a prisoner is held without any lawful authority, and by order beyond the jurisdiction of an inferior Federal Court to make, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all."

Similar language was used by Mr. Justice Miller in *Ex parte Yarbrough*, 110 U. S. 652-653, 4 Sup. Ct. 152, 28 L. Ed. 274:

> "This court has no general authority to review, on error or appeal the judgments of the Circuit Courts of the United States, in cases within their criminal jurisdiction, is beyond question; but it is equally well settled that, when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without jurisdiction of that court, it is not only within the authority of the Supreme Court, but it is its duty, to inquire into the cause of commitment, when the matter is properly brought to its attention, and if found to be, as charged, a matter of which such a court had no jurisdiction, to discharge a prisoner from confinement."

Conclusion.

The question involved in this case are important questions of Federal law in which the opinion of the Circuit Court of Appeals is probably in conflict with decisions of this Court and which should be decided by this Court. It is, therefore, respectfully submitted that this petition for certiorari, should be granted.

Respectfully submitted,

HUGH ALLEN BOWEN,
Petitioner.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 359

HUGH A. BOWEN,

Petitioner,

vs.

JAMES A. JOHNSON, WARDEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MEMORANDUM FOR PETITIONER UPON ARGUMENT.

SETH W. RICHARDSON,
Attorney for Petitioner.

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I.

The Act of November 19, 1890, found at page 40 of the Government's brief reserved full criminal jurisdiction over persons and citizens in the said ceded territory "as over other persons and citizens in this state".

The policy indicated by this statute with respect to the retention of criminal jurisdiction was continued in later

legislation affecting roads and highways adjacent to the park as follows:

Laws of Georgia (1893) page 110;
Laws of Georgia (1895) page 77;
Laws of Georgia (1901) pages 85-87;
Laws of Georgia (1902) page 110.

There is, therefore, everywhere apparent a purpose on the part of the State to retain its criminal jurisdiction over this partcular park.

In the Georgia Code (1933), Sections 15-302, effective January 1, 1935, "purports", says the Government's brief (p. 32), to reenact certain restricted jurisdictional provisions contained in Acts before the 1927 statute", but the Government asserts that this section is without application, because the crime was committed in 1930. The important point is that this 1933 reenactment shows the continuing purpose of the State of Georgia to retain its criminal jurisdiction, regardless of the 1927 statute.

Then follows the Act of February 16, 1935, in which the State ceded jurisdiction of land for national monuments in which the reservation of criminal jurisdiction to the State was almost identical with the language of the 1890 statute.

Thereafter came the Act of March 8, 1935, covering a cession of jurisdiction over certain swamp lands, the State retaining criminal jurisdiction "as if this Act had not been passed".

It is apparent, therefore, that the legislative purpose to retain criminal jurisdiction has been consistent ever since the passage of the 1890 statute.

In addition to the foregoing consistent policy on the part of the State of Georgia, the following reasons why the 1927 Act may not appropriately be construed as effectuating an

implied repeal of all the legislation above referred to, are as follows:

1. No reference whatever is made to the special acts affecting this particular park.

2. The Act contains no repealing clause.

3. It is a general Act without specific application.

4. We have been able to find no notice to the United States of the passage of the Act, and no acceptance of the exclusive jurisdiction therein referred to.

5. A personal examination of the House and Senate Journals discloses no assigned reason for the Act, or explanation as to what particular acquisitions it refers. (See Exhibit 1.)

6. The language used in the Act is unusual and highly restricted. It applies to "custom houses, post offices, arsenals, other public buildings whatever, or for any other purposes of government". The only possible application the Act might have to this park would be under the phrase "other purposes of government". Under the rule of *ejusdem generis*, such purposes ought to reflect purposes similar to the preceding acquisitions, such as custom houses, post offices, etc.

7. Repeals by implication are not favored and will not be sustained unless there is an inability to reconcile the two conflicting statutes. No such difficulty appears here because of the nature of objects recited in the 1927 Act as compared with an acquisition such as a national park.

8. Subsequent general statute will not impliedly repeal an earlier specific statute. (See Federal Statutes Ann., Vol. 1, Section 142, citing *Rodgers* v. *United States*, 185 U. S. 83; *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487.) It

is thus insisted that the provisions of the 1890 statute survives the passage of the 1927 statute, and that the statute of 1890 is controlling as to the jurisdiction of the United States over the park area.

This situation seems to reflect the actual administrative situation in the field, as indicated by the letter of the Solicitor General of the Rome District. (See Exhibit 2.)

There is also what seems to be a tacit acceptance of the present validity of the 1890 statute in connection with the proceedings in the Circuit Court of Appeals below, since that court made no attempt to dispose of the point in question by finding that the 1927 statute conferred exclusive jurisdiction on the United States, although the record discloses (fol. 77) that copies of the applicable Georgia and Federal Statutes were to be delivered to the Court.

II.

Asserting for petitioner that the United States must be found, as a matter of law, to be without exclusive jurisdiction over the park area, the Government contends that since the point only goes to the jurisdiction of the United States, it is defensive, and therefore is conclusively determined by the judgment of conviction. (Citing *Louie* v. *United States*, 254 U. S. 548; *Pothier* v. *Rodman*, 261 U. S. 307; and *Rodman* v. *Pothier*, 264 U. S. 399.)

In each of these cases proceedings had not terminated in the courts below, and a forum then existed in which the question of the jurisdiction of the United States could be litigated. Moreover, the question of jurisdiction in those cases depended upon conflicting facts and not upon the purely legal question.

In *Walsh* v. *Archer*, 73 F. (2d) 197, the issue of fact controlling jurisdiction was whether the crime was committed at sea or in the harbor. Most of the other cases cited by the Government are with respect to Indians who claimed to

be outside the jurisdiction of the court because of the issuance of patents—a situation which the court had definitely held was not sufficient to oust the United States of a then *status quo* of exclusive jurisdiction.

Undoubtedly the general rule is in the individual case that the court will not review upon *habeas corpus* matters determined or determinable by the trial court. But, as indicated, that rule has been largely established in cases where the defendant still had an opportunity to present the point in the lower court.

In practically all of these cases, the court indicates that the general rule thus referred to is inapplicable where exceptional circumstances exist, impelling the court in the interest of public justice to accept jurisdiction on *habeas corpus*.

Thus in *United States* v. *Heff*, 197 U. S. 488, the Court discharged a prisoner on *habeas corpus*, where the court found that the United States was without jurisdiction of the person and subject matter of the offense. This decision was made, the Court said, in *United States* v. *Lincoln*, 202 U. S. 178, because exceptional circumstances existed which took the case out of the ordinary rule. The exceptions noted by the Court were as follows:

1. That both the State and the United States claimed jurisdiction over the claim. This exact condition exists in the case at bar, since the defendant was first arrested by the State charged with this specific offense. (Petition for Certiorari, p. 2.)

2. That, in the *Heff* case, since the Circuit Court of Appeals below had decided the point against petitioner's contention in another case, it would be useless to require the petitioner to present the point to that court. A more extreme condition exists here, because here, due to lapse of

time, the Circuit Court of Appeals would have no power whatever to consider the point at this time.

3. That in the *Heff* case, that question of jurisdiction of the Nation and the States concerning large numbers of Indians raised a question of public interest. The same precise condition exists here since due to the multitude of non-resident citizens thronging through such a national park, the question of the controlling jurisdiction over crimes becomes a matter of even greater public significance.

Consequently since in the *Heff* case the Court permitted the consideration of the question of the jurisdiction of the United States in a *habeas corpus* proceeding, that case, since it has not been overruled, is an authority supporting petitioner's demand here.

III.

It is not fair to say that the defendant intentionally stood aside and permitted his right of appeal to fail, and therefore should not, equitably, be permitted to again raise the point here.

The defendant was without funds, was kept in jail for more than two years prior to his trial, was not given a copy of the indictment and the names of the witnesses, as provided in the Federal Statute, which was mandatory (*Logan* v. *U. S.*, 144 U. S. 263) and when he requested that the record be reported, was advised that since he was a pauper, the Government should not be put to the expense of a report (R. 5). Thereafter, he alleges, in his petition for certiorari that his attorney unwarrantably failed to appeal (Page 4, Pet. Cert.). Petitioner's persistent efforts to get the matter thereafter reviewed on *habeas corpus* indicates that his failure to take an appeal in his case was not his fault, and that he at least should not be blamed because no appeal was perfected.

IV.

The record in this case is very deficient. The District Court apparently made no particular effort to develop the facts. If the Court, therefore, should feel that a full development of the facts would be advisable, in order to permit the Court to determine whether this proceeding will be viewed as an exception, then under the rule in the case of *Johnson* v. *Zerbst,* decided at the last term, the Court has power to remand the case to the District Court in order that the record may be properly made. On the other hand, if the Court, in view of the public importance of the decision, accepts petitioner's contention that the United States did not have exclusive jurisdiction over the park area, then it would seem that without further examination of the facts below, the writ should issue, and the petitioner should be appropriately turned over to the authorities of the State of Georgia for a proper disposition of the case against petitioner under the laws of Georgia.

Respectfully,

SETH W. RICHARDSON,
Attorney for Petitioner.

EXHIBIT No. 1.

Memorandum.

History of the Act of 1927.

Senate Bill 191 was introduced July 27, 1927, by Senator Myrick. It was identified as "a bill to provide for acquisition of lands in the state of Georgia by the United States Government".

The bill was reported favorably, without comment, on July 28th, under the same title designation, and on August 8th, was unanimously passed.

On August 10th, the bill was introduced in the House under the same title designation. It was favorably reported without comment on August 17th, and on August 20th, was passed unanimously.

EXHIBIT No. 2.

November 4, 1938.

MR. SETH W. RICHARDSON,
815 15th Street,
Washington, D. C.

DEAR SIR:

Your letter of the 31st ultimo, addressed to the Attorney General of the State of Georgia, has been referred to the writer as Solicitor General of the Rome Judicial Circuit, the Circuit in which the Chickamauga-Chattanooga National Military Park is located. This National Military Park is also located in the Cherokee Judicial Circuit of the State of Georgia.

Upon making reference to your letter to the Attorney General, beg to advise that there is an Act of the General Assembly of the State of Georgia ceding to the United States of America criminal jurisdiction over persons within the park area, and all felony and misdemeanor cases committed upon this Military Reservation. However, in the past years,

since this Act of the General Assembly, as well as National legislation, which you will find in the United States Code Annotated in Volume 16 of the latest edition, many misdemeanor and felony cases that the sheriffs of Catoosa and Walker Counties apprehend on the Military Reservation have been tried in the courts of the State of Georgia. There have been two murder cases that were committed in the park that were tried in the State courts. In the last two years there have been cases of murder which were tried in the United States District Court in Rome that were committed on the same Reservation. It seems that no one has ever raised the point as to the question of jurisdiction of these cases, preferring to be tried in the court which preferred the indictment in each case.

I am advised that the usual practice, when a person is apprehended for driving an automobile while under the influence of intoxicating liquors, is to turn the person over by the Military authorities to the State authorities, rather than have the matter handled in the Federal Court. This practice has been in force for many years, while, as a matter of strict law, all violations are subject to being tried in the United States District Court where civilians have committed the offenses.

Since my connection as prosecuting attorney of this Circuit, it has been the policy, or rather the desire of the persons in charge of this Military Reservation to refer practically every criminal violation on the part of civilians over to the State Courts.

Trusting that this information has answered your inquiry, and, if I can be of any further service, I will be delighted to do so, I am,

Yours very truly,

(Sgd.) J. RALPH ROSSER,
Solicitor General of Rome Circuit.

(9526)

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FILE COPY

INDEX

CITATIONS

118860—39——1

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 359

HUGH ALLEN BOWEN, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 27–32) is reported in 97 F. (2d) 869.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 27, 1938 (R. 32). The petition for a writ of certiorari was filed in this Court on September 16, 1938, and was granted on October 10, 1938 (R. 33). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

This Court in granting the petition for a writ of certiorari limited its review to "the question of the jurisdiction of the District Court on habeas corpus" (R. 33).[1] In the light of the petition and return, the opinion of the court below, and the petition for certiorari, the question presented, as we conceive it, is the following:

1. Whether the District Court on habeas corpus had jurisdiction to determine the question of the

[1] The petition for a writ of certiorari was not served on the Solicitor General before it was granted. There would seem to be no question as to the jurisdiction of the District Court in the instant case to entertain the petition for a writ of habeas corpus, filed in the United States District Court for the Northern District of California, which alleged that the petitioner was in prison and illegally restrained of his liberty by the Warden of the United States Penitentiary, Alcatraz, California, within the jurisdiction of that District Court (R. 1). The return (R. 16–17) to the order to show cause why a writ of habeas corpus should not be issued (R. 16) averred that the petitioner was detained by the warden under a sentence and order of commitment of the United States District Court for the Northern District of Georgia and a transfer order issued for the Attorney General of the United States by the Director of the Bureau of Prisons of the United States Department of Justice. Certified copies of the sentence, order of commitment, and transfer order were annexed to and made a part of the return. The petitioner consequently was within the territorial jurisdiction of the United States District Court for the Northern District of California (R. S. 752, as amended, *infra*, p. 38) and was in custody "under or by color of the authority of the United States" (R. S. Sec. 753, *infra*, p. 38).

exclusive jurisdiction of the United States over the National Park in which the crime charged was alleged to have been committed.

Disposition of the appeal after determination of the question presented possibly may involve consideration of two additional questions:

2. If the District Court on habeas corpus had jurisdiction to determine the question of exclusive jurisdiction of the United States, whether the petition for a writ of habeas corpus was sufficient to require exercise of that jurisdiction.

3. Whether the State of Georgia ceded exclusive jurisdiction of the National Park to the United States.[2]

STATUTES INVOLVED

The pertinent statutes are copied in the Appendix, *infra*, pp. 38–43.

STATEMENT

The instant case was decided by the District Court on the basis of the petition for a writ of habeas corpus and the return to an order to show cause why the writ should not be issued.

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[2] Some of the several other grounds for habeas corpus alleged in both the petition for habeas corpus and the petition for certiorari possibly might be considered to involve a "question of the jurisdiction of the District Court on habeas corpus" and therefore are also discussed briefly, Point IV, *infra*, p. 34, but, as we understand it, these questions probably are not involved on this review.

The petition (R. 1–9)[2] which was filed on September 25, 1937, alleges that the petitioner is illegally restrained of his liberty by the respondent for a number of reasons set forth in four groups, as follows:

1. The first group (R. 1–3) alleges in general terms that the indictment failed to charge any crime against the United States, that its allegations were insufficient to show jurisdiction over the person and subject matter; and then, principally—

> That the indictment is defective and void and any verdict and judgment rendered thereon are fatally defective and void for that it was necessary for the United States District Court to show jurisdiction over the person of the defendant, of the crime charged, and of the exact territory or place where it was alleged to have been committed, to wit, Chickamauga National Park otherwise than by showing or alleging that it was committed within the jurisdiction of the court without fixing a definite place or location or even the county where committed and without attempting to show exclusive jurisdiction over this national park otherwise than by merely averring that said jurisdiction had been conferred upon the United States Courts as follows: "And within the jurisdiction of said court and within a cer-

[2] The petition for writ of certiorari filed in this Court contains a number of alleged grounds for habeas corpus which are not contained in the petition for a writ of habeas corpus or elsewhere in the record.

tain place and on certain lands reserved and acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, and acquired by the United States *States* by consent of the legislature of the State of Georgia."

That no exclusive jurisdiction over said Chickamauga National Park could be so granted by mere consent of the legislature of the State of Georgia, and that to confer and release exclusive criminal jurisdiction to the United States, it would be necessary that the territory, place or places be regularly ceded to the United States by the State of Georgia and that for this reason the indictment was fatally defective even in the absence of a demurrer and no legal judgment or sentence could be based thereon.

That said indictment is void because it does not set forth verbatim or in substance any consent or act of the legislature of Georgia ceding or seeking to cede criminal jurisdiction to the United States, the territory and lands referred to in the indictment, any such consent or act being a local law when taken in connection with federal procedure, which is necessary to be pleaded.

2. The second group of reasons (R. 3–6) for the issuance of the writ asserts that petitioner was denied due process of law because the indictment did not sufficiently allege the offense charged, did not allege a common design and purpose of the three defendants to murder the deceased, guilty knowledge or criminal purpose, the time, place,

and circumstances of the alleged crime, or that the killing was done feloniously; because the case was transferred from the Atlanta to the Rome Division of the District Court for the Northern District of Georgia without petitioner's consent and because he was tried in a county of the State of Georgia in which no part of the Chickamauga National Park was located; because the petitioner was not furnished with a copy of the indictment and a list of witnesses prior to the trial; because no stenographic copy of the testimony was made and preserved, so that the petitioner "might hope to appeal"; and because under the allegations in the indictment only one of the defendants could be guilty of the crime.

3. In a third subdivision of his petition (R. 6–8) petitioner asserts that since it is the policy of the Federal courts to regard habeas corpus as "a matter of grace," the petitioner was entitled to his discharge because his co-defendant Smith had made a voluntary unsolicited statement that petitioner had nothing to do with the commission of the murder and that he killed the deceased while the petitioner was asleep in an automobile, without the petitioner having any knowledge of the murder until after it was committed; because the instant case was a proper one in which to issue the writ even though there had existed a remedy by appeal; because a certified copy of the indictment furnished to the petitioner by the Clerk of the United States District Court for the Northern District of Georgia

"carries no verdict and no judgment or sentence, the spaces and places allotted therefor are wholly blank with nothing written thereon"; "Because the United States has no exclusive jurisdiction over Chickamauga National Park"; because of the petitioner's good conduct since his confinement and a statement by the trial court in a letter to the petitioner's mother expressing his attitude with respect to the petitioner's release by commutation or pardon; and because the petitioner was convicted upon purely circumstantial evidence.

4. The final subdivision of the petition (R. 8–9) sought the petitioner's discharge on the grounds of his youth and inexperience at the time the crime was committed, his conviction upon circumstantial evidence, his desire to be with and to provide for his daughter and mother, and his alleged innocence of the charge.

The exhibits attached to the petition are a certified copy of the indictment with certain entries on the back thereof (R. 9–12); two affidavits of prisoners in the Atlanta Penitentiary respecting a conversation with the petitioner's co-defendant Smith which indicated that the petitioner was asleep and drunk at the time the actual killing took place (R. 12–14); a letter from the trial judge to the petitioner's mother (R. 15).[1]

[1] A statement of facts and brief of law, apparently submitted by the petitioner in connection with his petition, was omitted in printing (R. 15).

Omitting formal parts, the indictment against the petitioner, which was returned in November 1931 by a grand jury in the United States District Court for the Northern District of Georgia, Atlanta Division, charged (R. 9–10):

> that John E. Smith, alias John Eddington, Hugh A. Bowen, alias Hugh Allen, alias Henry Boss, and William Frank Bowen, alias Frank Bowen, hereinafter called the defendants, on the 14th day of December, in the year 1930 A. D. in the Rome Division of the District aforesaid, and within the jurisdiction of said court, and within a certain place and on certain lands reserved and acquired for the exclusive use of the United States and under exclusive jurisdiction thereof, and acquired by the United States by consent of the Legislature of the State of Georgia, to wit: Chickamauga and Chattanooga National Park, sometimes known as Chickamauga and Chattanooga National Military Park, in said State of Georgia did then and there unlawfully, willfully, deliberately and with malice aforethought upon one, Raymond Kington, a human being, make an assault and did then and there him, the said Raymond Kington, unlawfully, willfully, deliberately, maliciously, premeditatedly and with malice aforethought kill and murder by shooting and wounding him, the said Raymond Kington, in the head, neck and face with a certain loaded shotgun, a more perfect description of said shotgun being to the grand jurors unknown, then

> and there held in the hands of one of said defendants but which particular one of said defendants is to the grand jurors aforesaid unknown, the said loaded shotgun being then and there an instrument likely to produce death, and said defendants did thereby inflict, cause and produce a certain mortal wound and wounds in the head, neck and face of him, the said Raymond Kington, from which mortal wound and wounds by the said defendants so inflicted aforesaid, he, the said Raymond Kington, on the 14th day of December A. D. 1930, did then and there die. * * *

In response to the petition for writ of habeas corpus, an order was entered by the District Court directing the Warden of the Penitentiary to show cause why the writ should not be issued (R. 16).

Pursuant to this order the Warden filed a return (R. 16–17) stating that the petitioner was detained under and by virtue of a judgment and sentence, and order of commitment issued by the United States District Court for the Northern District of Georgia, Rome Division, and a transfer order issued for the Attorney General by the Director of the Bureau of Prisons of the United States Department of Justice. The return prayed that the petition be dismissed (R. 16–17). Certified copies of the judgment and sentence, order of commitment, transfer order, and "record of Court Commitment United States Penitentiary, Alcatraz, California," were annexed to the return as

exhibits and made a part of such return (R. 17–22a).[5]

These documents annexed to the return disclose that on February 6, 1933, the petitioner entered a plea of not guilty to the indictment and went to trial before District Judge E. Marvin Underwood of the District Court for the Northern District of Georgia, Rome Division (R. 18). On February 11, 1933, the jury returned a verdict of guilty without capital punishment (R. 18). On February 16, 1933, the petitioner was sentenced to life imprisonment in such penitentiary as the Attorney General of the United States might designate (R. 18–19). On August 15, 1934, by order of the Director of the Bureau of Prisons of the Department of Justice of the United States, issued on behalf of the Attorney General, the petitioner was transferred from the United States Penitentiary at Fort Leavenworth, Kansas, to the United States Penitentiary at Alcatraz, California (R. 20–21).

On October 9, 1937, the case came on for hearing on the order to show cause. No appearance was made by the attorneys for the petitioner. An Assistant United States Attorney appeared on behalf of the Warden and filed the return to the order to show cause. On motion of the Assistant United States Attorney the petition was submitted. On October 11, 1937, the District Court entered an

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[5] A memorandum of points and authorities against the petition for a writ of habeas corpus, submitted on behalf of the respondent, was omitted in printing (R. 23).

order denying the petition for a writ of habeas corpus (R. 23).

An appeal was then taken by the petitioner to the Circuit Court of Appeals for the Ninth Circuit (R. 24–25). The case apparently was submitted to that court on briefs without oral argument. In addition, counsel for the respondent was granted leave to file copies of the Georgia and Federal statutes which might be involved (R. 26).

The order of the District Court denying the petition for habeas corpus was unanimously affirmed by the Circuit Court of Appeals (R. 32).

In its opinion the Circuit Court of Appeals stated (R. 28) that the petitioner's principal claim was that the District Court in which he was tried had no jurisdiction over the Park in which it was alleged the crime was committed for the reason that jurisdiction over such area could not constitutionally have been ceded to the United States and, in fact, was not so ceded, and that the indictment was defective in not alleging the details of such cession to the United States by the State of Georgia.

As to these principal contentions the court below held that on collateral attack in habeas corpus the judgment is valid unless the lack of jurisdiction appears on the record; that in this case if the United States constitutionally could acquire jurisdiction over the Park, lack of jurisdiction did not affirmatively appear on the record,[6] and the further

[6] The only part of the "record of conviction" in the trial court which was before the District Court in the instant

question whether in fact the United States did have such jurisdiction over the Park and over the defendant becomes a seriously controverted question of law and fact to be determined by the trial court, which cannot be questioned on habeas corpus; and that *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, determined the existence of the constitutional power of the United States to acquire and exercise exclusive jurisdiction over a national park such as Chickamauga and Chattanooga National Park (R. 28–31).

The court below also held that the contention of the petitioner that the indictment was defective in not describing with particularity the place of the commission of the crime could not be raised on habeas corpus. The court held to be without merit the contention that the indictment did not charge that the petitioner committed a crime against the United States because all three defendants could not be guilty of murdering one man with a shotgun and the contention that the indictment was defective because it failed to allege that the killing was done feloniously (R. 31–32).

As to the other objections urged by the petitioner, the court held that they were "wholly in-

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habeas corpus proceedings consisted of certified copies of the indictment, judgment, and sentence and order of commitment. It was for this reason that the court below of necessity looked to the indictment in determining whether the record affirmatively disclosed that the crime charged was not one within Federal cognizance.

sufficient in point of law and call for no discussion" (R. 32).

The petition for a writ of certiorari asserts (pp. 6–8) as reasons for granting the writ (1) that the decision of the court below that habeas corpus will not lie is in direct conflict with decisions of this Court, (2) that the decision below, while not holding a State cannot qualify its grant of jurisdiction to the United States, "left such an inference" and is probably not in harmony with decisions of this Court, (3) that the decision of the court below, that where it appears from the record that the court did have jurisdiction, though such jurisdiction was expressly reserved to the State by the legislative act of cession, the record cannot be examined, is probably in conflict with decisions of this Court, and (4) that the decisions of this Court discussing the language of an indictment charging the offense with particularity indicate that the decision of the court below is probably in conflict with the decisions of this Court.

SUMMARY OF ARGUMENT

I. The District Court on habeas corpus had no jurisdiction to inquire into the question of whether the locus of the crime, the Chickamauga and Chattanooga National Park, was within the jurisdiction of the United States. Exclusive jurisdiction, being a necessary element for Federal cognizance of the offense, involved an issue of law and fact triable only by the trial court and reviewable only

on appeal. *Louie* v. *United States,* 254 U. S. 548; *Pothier* v. *Rodman,* 261 U. S. 307, *Rodman* v. *Pothier,* 264 U. S. 399.

II. Even if the petitioned court had jurisdiction to inquire whether the United States had exclusive jurisdiction, so as to bring the offense within Federal cognizance, the judgment of the trial court is presumed to be valid unless it affirmatively appears from the record that the court was without jurisdiction. The indictment alleges that the offense was committed within a place under the exclusive jurisdiction of the United States. The unsupported allegation in the petition that "the United States had no exclusive jurisdiction over Chickamauga National Park" was not an affirmative showing of lack of jurisdiction sufficient to rebut the presumption of verity in favor of the allegation of the indictment and the validity of the judgment.

III. In any event, the United States did have exclusive jurisdiction over the locus of the crime, the Chickamaugua and Chattanooga National Park, by virtue of the Georgia statute of 1927 ceding exclusive jurisdiction to the United States.

IV. The petitioner's other alleged grounds for habeas corpus are without merit.

ARGUMENT

This brief is confined to the case and the record made by the petition for a writ of habeas corpus and the return to the order to show cause why such a writ should not be issued and the documents an-

nexed thereto, on the basis of which the District Court denied the petition for a writ of habeas corpus.[7] The petitioner's attorneys did not appear at the hearing on the order to show cause and there was no testimony taken.

The indictment charged murder in the Chickamauga and Chattanooga National Park within the jurisdiction of the District Court and on land acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof (R. 9–10). Section 272 of the Criminal Code (Title 18, U. S. C., Sec. 451) provides:

> The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> * * * * *
>
> Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for

[7] The petition for a writ of certiorari contains many statements of fact and contention which do not appear in the petition for a writ of habeas corpus or elsewhere in the record. For example, it is stated in the petition for certiorari (p. 3) that at the time of the trial petitioner produced testimony by two surveyors to show that the crime was not committed within the limits of the Chickamauga and Chattanooga National Park, that the deceased's body was found more than 200 yards from the nearest boundary of the Park, and that no testimony was offered by the Government to refute these statements.

> the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Sections 273 and 275 of the same chapter of the Criminal Code (U. S. C., Title 18, Secs. 452, 454) define the crime of murder and provide for its punishment. (See *infra*, p. 39.)

The petition for a writ of habeas corpus sets forth two principal groups of reasons why the petitioner's detention is illegal. The first group relates to the alleged insufficiency of the indictment to show jurisdiction of the District Court (*supra*, p. 4) and the second group is based upon the alleged denial of due process of law (*supra*, p. 5).

The principal allegations of the petition with respect to exclusive jurisdiction of the United States found in the first group of reasons do not in terms allege that the State of Georgia could not or did not in fact cede exclusive jurisdiction to the United States, but merely allege that the indictment is void because it does not show exclusive jurisdiction otherwise than by averring exclusive jurisdiction to have been acquired by consent of the legislature of the State of Georgia, that exclusive jurisdiction could not be granted by mere consent of the legislature but must be regularly ceded, and that the indictment fails to set forth *verbatim* or in substance any consent or act of the legislature of Georgia ceding criminal jurisdiction which must be pleaded (R. 2, 3). Apparently the petitioner contended under these allegations that the indict-

ment as a matter of pleading should have set forth the statutes of Georgia ceding the exclusive jurisdiction. That contention seems unfounded even if raised by demurrer to the indictment, but apart from this question certainly it is not a valid ground for collateral attack upon the indictment in habeas corpus. *Knewel* v. *Egan,* 268 U. S. 442, 446; *United States* v. *Pridgeon,* 153 U. S. 48; *Cuddy, Petitioner,* 131 U. S. 280.

In the third group of reasons, however, the petition does allege that the petitioner should be discharged "Because the United States has no exclusive jurisdiction over Chickamauga National Park" (R. 7). The court below stated that the petitioner's principal claim is that the District Court had no jurisdiction over the Park in which the crime was alleged to have been committed because jurisdiction over that area could not constitutionally be, and in fact was not, ceded to the United States by the State of Georgia.

Accepting, *arguendo,* this interpretation of the petition by the court below, the respondent believes that this is the petitioner's only substantial contention and that the question of the jurisdiction of the District Court on habeas corpus to determine whether in fact the United States obtained exclusive jurisdiction over the Park is "the question of the jurisdiction of the District Court on habeas corpus" to which review has been limited (R. 33).

The respondent also contends that even if the

District Court on habeas corpus had jurisdiction to determine whether in fact the United States obtained exclusive jurisdiction, the meager allegations of lack of exclusive jurisdiction in the petition for a writ of habeas corpus, unsupported by any showing in support of these allegations, are wholly insufficient to require the District Court on habeas corpus to exercise its jurisdiction and the denial of the petition was correct on that ground.

Moreover, even if the District Court had jurisdiction to consider this question, and even if the allegations of the petition be deemed sufficient to require its consideration, the United States did have exclusive jurisdiction and for that reason the petition may properly be denied.

The petitioner's other contentions, not with respect to the exclusive jurisdiction of the United States, which possibly might be thought to involve the jurisdiction of the District Court on habeas corpus are without merit, *infra*, p. 34.

The respondent contends, therefore, (I) that the District Court on habeas corpus had no jurisdiction to determine the question whether in fact the State of Georgia ceded exclusive jurisdiction of the Park to the United States; (II) even if the District Court had such jurisdiction the allegations of the petition were insufficient to require its exercise; (III) the United States had exclusive jurisdiction; and (IV) the other contentions of the petitioner do not present grounds for habeas corpus.

I

THE DISTRICT COURT ON HABEAS CORPUS HAD NO JURISDICTION TO DETERMINE WHETHER IN FACT THE STATE OF GEORGIA HAD CEDED EXCLUSIVE JURISDICTION TO THE UNITED STATES

Denial of the petition was affirmed by the court below on the ground that the United States could constitutionally acquire exclusive jurisdiction over the National Park involved, that, therefore, lack of jurisdiction did not affirmatively appear upon the record in the criminal case, and that the further question whether in fact the United States did have such jurisdiction over the Park is a seriously controverted question of law and fact which can not be questioned on habeas corpus (R. 29–30).

It is clear that the United States constitutionally could acquire exclusive jurisdiction over the Park. *Collins* v. *Yosemite Park Co.*, 304 U. S. 518.* The question remains whether the court below properly refused to go further and correctly determined that the District Court on habeas corpus lacked jurisdiction to decide the further question whether in fact the United States had obtained exclusive jurisdiction over the Park.

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*The court below took the view that it had jurisdiction on habeas corpus to determine this constitutional question on the ground that if the United States could not constitutionally acquire exclusive jurisdiction over a National Park the lack of jurisdiction would thus affirmatively appear on the face of the record and the judgment, therefore, would be subject to collateral attack on habeas corpus.

It is settled that habeas corpus calls in question only the jurisdiction of the court whose judgment is challenged. It is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved. Otherwise, every judgment of conviction would be subject to collateral attack and review on habeas corpus. *Knewell* v. *Egan,* 268 U. S. 442, 445, 446; *Johnson* v. *Zerbst,* 304 U. S. 458, 465, 468.

The scope of review or "jurisdiction" on habeas corpus is limited to an examination of the "jurisdiction" of the court whose judgment is challenged. "Jurisdiction" of the court whose judgment is challenged is stated to mean in criminal cases jurisdiction over the person accused and over the subject matter, that is, over the type of offense charged.* *Knewell* v. *Egan,* 268 U. S. 442, 444; *Felts* v. *Murphy,* 201 U. S. 123, 129; *Valentina* v. *Mercer,* 201 U. S. 131, 138; *Bergemann* v. *Backer,* 157 U. S. 655, 656, 659; *Andrews* v. *Swarz,* 156 U. S. 272, 276; *Ex parte Bigelow,* 113 U. S. 328, 330; *Ex parte Parks,* 93 U. S. 18, 20.

Habeas corpus is also available if the court with jurisdiction over the person and subject matter commits an error which is held to deprive it of

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* The meaning of "jurisdiction" of the court whose judgment is questioned had not become absolutely fixed. *Craig* v. *Hecht,* 263 U. S. 255, 280 (Holmes, J., dissenting), affirming *Ex parte Craig,* 282 Fed. 138, 155–158 (L. Hand, D. J., dissenting); *Henry* v. *Henkel,* 235 U. S. 219, 228.

jurisdiction. *Johnson* v. *Zerbst*, 304 U. S. 458; *Frank* v. *Mangum*, 237 U. S. 309. Habeas corpus may also lie if the judgment rendered is one beyond the power of the court. *In re Bonner, Petitioner*, 151 U. S. 242; *Ex parte Lange*, 18 Wall. 163. These latter grounds for habeas corpus are not involved in the petitioner's objection based on alleged lack of exclusive jurisdiction of the United States.

The petitioner contends in effect that the District Court lacked jurisdiction of the subject matter in this case because the Park in which the offense is alleged to have been committed is not land within the exclusive jurisdiction of the United States. The respondent contends that a controlling distinction must be observed between jurisdiction of the District Court which may be examined on habeas corpus and the exclusive jurisdiction of the United States over the Park. The District Court, with jurisdiction over all Federal crimes committed within the district, had jurisdiction over this crime charged to have been committed within the district upon land alleged to be within the exclusive jurisdiction of the United States. The separate question whether in this particular case the land within the district and so within the territorial jurisdiction of the District Court, was also within the exclusive jurisdiction of the United States "raised a question not of the jurisdiction of that court, but of the jurisdiction of the United States." *Louie* v. *United States*, 254 U. S. 548, 550. The petitioner's

contention is, in effect, that he did not violate the laws of the United States, that his offense was not within Federal cognizance. Exclusive jurisdiction of the United States is an element of the offense and is a question which "went to the merits." *Louie* v. *United States, supra,* 551; *Pothier* v. *Rodman,* 261 U. S. 307, 311; *Rodman* v. *Pothier,* 264 U. S. 399, 402–403.

1. In the *Louie* case, *supra,* the defendant, an Indian convicted of murder of another Indian on an Indian Reservation, under Section 273 of the Criminal Code here involved which requires the offense be committed on land within the exclusive jurisdiction of the United States, objected to the jurisdiction of the District Court on the ground that the land had been allotted and deeded to the defendant in fee simple before the crime was alleged to have been committed. The objection was overruled and on appeal the Circuit Court of Appeals held that the sole question was one of jurisdiction of the District Court reviewable only by direct writ of error from the Supreme Court. This Court held, however, that the question was not one of jurisdiction of the District Court, remanded it to the Circuit Court of Appeals, and stated at pages 550–551:

> The motions made by defendant in the District Court raised a question not of the jurisdiction of that court but of the jurisdiction of the United States. The contention was, in essence, that, by reason of the facts set

> forth in the motions, the defendant was in respect to the acts complained of subject to the laws of the State of Idaho and not to the laws of the United States. In other words that he did not violate the laws of the United States. * * * The defendant, in effect, denied that the killing was, in the statutory sense, within the reservation. If this was true an essential element of the crime against the United States was lacking; * * *
>
> Since defendant's motions in the District Court did not raise a question properly of the jurisdiction of the court but went to the merits, there was no basis for a direct writ of error from this court. * * *

In the *Rodman* case, *supra*, the defendant, indicted for murder on a military reservation within the exclusive jurisdiction of the United States, contested removal on the ground that the United States lacked exclusive jurisdiction over the place in which the crime was alleged to have been committed because no deed to the land had been yet received at the time of the crime.

On direct appeal (261 U. S. 307) to this Court from the order denying the writ this Court, following the *Louie* case, held (page 311) "that the objection raised by the petitioner does not raise a question of jurisdiction" of the district court but "goes to the merits" and transferred the case to the Circuit Court of Appeals. The Circuit Court of Appeals agreed with the petitioner that sov-

ereignty of the State over the tract was not relinquished until the deed was filed in the office of the county auditor and held that there was an absolute want of probable cause for removal. This Court on review (264 U. S. 399) reversed and held that there was probable cause for removal and that whether "the *locus* of the alleged crime was within the exclusive jurisdiction of the United States demands consideration of many facts and seriously controverted questions of law" which "must be determined by the court where the indictment was found," citing *Louie* v. *United States,* 254 U. S. 548.

The court below also cited and relied upon the *Louie* and *Rodman* cases in *Walsh* v. *Archer,* 73 F. (2d) 197, holding that the question whether the locus of the crime, a vessel at a disputed distance off the coast of California, was within the exclusive jurisdiction of the United States could not be raised on habeas corpus. The opinion of the court below in this case quotes from and relies upon the *Archer* decision.

The respondent submits that the court below correctly held on the authority of the *Louie* and *Rodman* cases that the question of exclusive jurisdiction of the United States could not be raised on habeas corpus.

2. The objection of lack of exclusive jurisdiction of the United States over the place where the crime is alleged to have been committed has been often made as the basis for a writ of habeas corpus, but

always without avail. *Rodman* v. *Pothier,* 264 U. S. 399; *Toy Toy* v. *Hopkins,* 212 U. S. 542; *United States* v. *Pridgeon,* 153 U. S. 48; *Hatten* v. *Hudspeth,* 99 F. (2d) 501 (C. C. A. 10th); *Walsh* v. *Archer,* 73 F. (2d) 197 (C. C. A. 9th); *Campbell* v. *Aderhold,* 67 F. (2d) 246 (C. C. A. 5th); *United States* v. *Lair,* 195 Fed. 47 (C. C. A. 8th), certiorari denied, 229 U. S. 609; *Ex parte Savage,* 158 Fed. 205 (C. C. Kans.); *Ex parte Columbia George,* 144 Fed. 985 (C. C. W. D. Wash.).

In *Toy Toy* v. *Hopkins, supra,* an Indian, accused of murder on an Indian reservation within the exclusive jurisdiction of the United States and convicted in the Circuit Court for the District of Oregon, sought release years later on habeas corpus on the grounds that the land on which the crime was committed had been allotted and ceased to be Indian country and that the defendant had become a citizen of the United States subject to the laws of the State of Oregon. Affirming denial of the writ and speaking of these alleged grounds for the writ, this Court stated at page 548:

> If such were the facts, and they made out a want of jurisdiction under the applicable statutes, which on the merits we do not hold, the Circuit Court, nevertheless, was authorized to hear and pass upon those questions in the first instance, and its decision was open to review in the appellate court by writ of error. But it could not be attacked collaterally as absolutely void, and *habeas corpus* cannot be availed of as a writ of error.

The respondent submits that upon these authorities the decision of the court below is correct.

3. It is a settled rule that on habeas corpus any examination of facts outside the record of conviction cannot extend to facts inconsistent with the record. *Riddle* v. *Dyche*, 262 U. S. 333, 336; *In re Mayfield*, 141 U. S. 107, 116; *Cuddy, Petitioner*, 131 U. S. 280, 286. The question whether "the *locus* of the alleged crime was within the exclusive jurisdiction of the United States demands consideration of many facts and seriously controverted questions of law." *Rodman* v. *Pothier*, 264 U. S. 399, 402.

In the present case the indictment alleges that the crime was committed on land within the exclusive jurisdiction of the United States (R. 9–10). Presumably, the question of exclusive jurisdiction was raised by the petitioner's attorney and decided upon the criminal trial.[10] The allegation of the petition that the United States has no exclusive jurisdiction over the Park (R. 7) is inconsistent with the record of the criminal conviction, and for that reason habeas corpus cannot be granted on the ground of lack of exclusive jurisdiction of the United States.

In the *Riddle* case, *supra*, this Court held (p. 334) that a recital in the record that "a jury of good and lawful men" was sworn could not be con-

[10] The petition for habeas corpus does not state, and it does not otherwise appear from the present habeas corpus record, whether the question of the exclusive jurisdiction of the United States was considered.

tradicted by a showing on habeas corpus that the case was tried before a jury of 11 men. Equally in this case the recital of exclusive jurisdiction of the United States cannot be contradicted on habeas corpus.

4. The extraordinary remedy of habeas corpus is reserved for exceptional cases or the single question of the jurisdiction of the district court "and even that will not be decided in every case in which it is raised." *Henry* v. *Henkel*, 235 U. S. 219, 228. The question of exclusive jurisdiction of the United States is not a question of the jurisdiction of the district court (*Rodman* v. *Pothier, supra; Louie* v. *United States, supra*) and certainly this is not an exceptional case. The question of exclusive jurisdiction of the United States is one commonly raised when a crime is charged in which one element is its commission in a place within the exclusive jurisdiction of the United States. This question can readily be litigated in a criminal trial. This Court has repeatedly stated that habeas corpus is not a mere substitute for an appeal. *Johnson* v. *Zerbst*, 304 U. S. 458, 465; *Knewel* v. *Egan*, 268 U. S. 442, 446. This rule applies even if the petitioner fails to avail himself, as in the instant case, of a right of appeal. *Goto* v. *Lane*, 265 U. S. 393; *Craig* v. *Hecht*, 263 U. S. 255, 280.[11]

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[11] While the petitioner alleges, in effect, in his petition for writ of certiorari that he was deprived of his right of appeal through the misconduct of his attorney (Pet. 4–5, 12), no such allegations were incorporated in his petition for writ of

II

THE PETITION FOR A WRIT OF HABEAS CORPUS IS WHOLLY INSUFFICIENT TO WARRANT EXERCISE OF JURISDICTION TO EXAMINE THE QUESTION OF EXCLUSIVE JURISDICTION OF THE UNITED STATES

Even if the District Court on habeas corpus has jurisdiction to determine the question of exclusive jurisdiction of the United States despite the allegation of exclusive jurisdiction in the indictment, which the respondent denies (Point I, *supra*), the question remains whether the petitioner's allegations and proof in any particular case are sufficient to require the court to exercise that jurisdiction. The respondent contends that even if such jurisdiction exists the allegations of the petition in this case were wholly insufficient to require its exercise and the denial of the petition may be supported on that ground.

The indictment alleged that the crime was committed on land within the exclusive jurisdiction of

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habeas corpus. The only allegation in such petition which relates to the matter of appeal is an allegation to the effect that an appeal was frustrated because the District Court refused to have a stenographic copy of the testimony at the trial made and preserved (R. 5). Obviously the review of questions as to the sufficiency of the indictment did not depend upon a stenographic transcript of the testimony at the trial.

the United States (R. 9–10). After judgment and upon collateral attack in habeas corpus the correctness of that allegation of exclusive jurisdiction is supported by the rule that it is presumed that the court acted rightly and had jurisdiction to render its judgment of conviction unless the absence of jurisdiction affirmatively appears on the record (*Knewel* v. *Egan*, 268 U. S. 442, 446; *United States* v. *Pridgeon*, 153 U. S. 48, 59; *Cuddy, Petitioner*, 131 U. S. 280, 285) and by the rule that the record of the trial court imports absolute verity and cannot be contradicted. *Riddle* v. *Dyche*, 262 U. S. 333, 336.

The respondent contends that if any allegations or proof on a petition for habeas corpus could overcome the presumption of correctness of the allegation in the indictment of exclusive jurisdiction of the United States, certainly a very clear showing by the petitioner of lack of exclusive jurisdiction should be necessaray to require the court to exercise jurisdiction to enter upon a consideration of this question on a collateral attack. Allegations of conclusions of law are insufficient to overcome the presumption of jurisdiction. *Cuddy, Petitioner*, 131 U. S. 280, 286.

1. In the present case the allegation that the United States lacked exclusive jurisdiction over the Park (R. 7) is a mere conclusion of law not requiring the District Court on habeas corpus to enter upon an independent consideration of the

question of exclusive jurisdiction of the United States.

2. The other allegations of the petition with respect to exclusive jurisdiction of the United States state that the indictment is void because it does not show exclusive jurisdiction otherwise than by merely averring exclusive jurisdiction to have been acquired by consent of the legislature of the State of Georgia, that exclusive jurisdiction could not be granted by mere consent but must be regularly ceded, and that the indictment fails to set forth *verbatim* or in substance any consent or act of the legislature of Georgia ceding criminal jurisdiction, which is necessary to be pleaded (R. 2–3).

Apparently the petitioner contended under these allegations that the indictment as a matter of pleading should have set forth the statutes of Georgia ceding exclusive jurisdiction to the United States. It has been held, however, that the sufficiency of an indictment cannot be reviewed in habeas corpus proceedings. *Knewel* v. *Egan,* 268 U. S. 442, 446; *United States* v. *Pridgeon,* 153 U. S. 48, 59. The failure to set forth the cession of exclusive jurisdiction more fully, even if possibly it would be a good ground for demurrer to the indictment, is not available on habeas corpus.

3. It was the duty of the District Court to refuse the writ if it appeared from the petition itself that the petitioner was not entitled thereto. R. S., Sec.

755; *Frank* v. *Mangum*, 237 U. S. 309, 332. The respondent submits that, even if a district court has jurisdiction to determine the question of the exclusive jurisdiction of the United States upon a petition overcoming the presumption of jurisdiction and indicating that in fact exclusive jurisdiction of the United States may not exist in the particular case, in the present case the petition is wholly insufficient basis for the exercise of that jurisdiction.

III

THE UNITED STATES DID HAVE EXCLUSIVE JURISDICTION OVER THE PARK

The court below held that it was not within its province on habeas corpus to determine the question whether in fact the State of Georgia had ceded exclusive jurisdiction over the Park in question to the United States. In view of the limitation contained in this Court's grant of certiorari, the respondent believes that this Court does not intend to consider or decide this question.

Even if it be held by this Court that the District Court on habeas corpus had authority to inquire into the question of the exclusive jurisdiction of the United States over the Park, and if it be further held that the petition for a writ of habeas corpus in the instant case was sufficient to require the peti-

tioned court to inquire into such question, and if this Court wishes to consider the question on this appeal instead of remanding it to the court below for that purpose, it appears that the United States in fact did have exclusive jurisdiction over the Park.

The first act of the legislature of the State of Georgia [12] ceding jurisdiction to the United States over the lands embraced within the Chickamauga and Chattanooga National Park did reserve to the State of Georgia "its civil and criminal jurisdiction over persons and citizens in said ceded territory." But in 1927 (Georgia Laws, 1927, p. 352), the State of Georgia ceded exclusive jurisdiction to the United States over all land "which has been or may hereafter be acquired for custom-houses, post-offices, arsenals, other public buildings whatever, or for any other purposes of government." [13] The only condition contained in the 1927 Act is the

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[12] Laws of Georgia, 1890, pp. 3–4, see Appendix, *infra*. pp. 40–42. Subsequent acts of the State of Georgia relating to roads, approaches and additions to the Park contained similar reservations. See Laws of Georgia, 1893, p. 110; Laws of Georgia, 1895, p. 77; Laws of Georgia, 1901, pp. 85–87; Laws of Georgia 1902, p. 110, 113.

[13] See Appendix, *infra*, pp. 42–43.

While Georgia Code, 1933, Section 15–302, effective January 1, 1935, purports to reenact certain restrictive jurisdictional provisions contained in acts before the 1927 statute, this section has no application in the instant case, inasmuch as the offense charged was alleged to have been committed in December 1930 (R. 10).

right of the State to serve on any such land all civil and criminal processes issued under the authority of the State. This condition is not incompatible with exclusive jurisdiction in the United States. *Fort Leavenworth R. R. Co.* v. *Lowe,* 114 U. S. 525, 535; *United States* v. *Cornell,* Fed. Cas. No. 14,867 (C. C. R. I.).

Since the 1927 statute has general operation throughout the State of Georgia and embraces any land acquired by the United States in the State of Georgia for any purposes of government, it follows, we submit, that the 1927 Act impliedly repealed the restrictive jurisdictional provisions of the 1890 Act and was effective to confer upon the United States exclusive jurisdiction over the lands contained in the Chickamauga and Chattanooga National Park. That the United States may constitutionally acquire and exercise exclusive jurisdiction over such a park is settled. *Collins* v. *Yosemite Park & Curry Co.,* 304 U. S. 518. Cf. *United States* v. *Gettysburg Electric Railway Co.,* 160 U. S. 668. Acceptance of such exclusive jurisdiction is presumed. *Fort Leavenworth R. R. Co.* v. *Lowe, supra; Benson* v. *United States,* 146 U. S. 325, 330.

We submit, therefore, a hearing before the petitioned court would reveal that the United States did in fact have exclusive jurisdiction over the place where the offense was committed, i. e., the Chickamauga and Chattanooga National Park.

IV

THE ALLEGATIONS OF THE PETITION FOR A WRIT OF HABEAS CORPUS, OTHER THAN THE ALLEGATIONS OF LACK OF EXCLUSIVE JURISDICTION OF THE UNITED STATES, PRESENT NO GROUNDS FOR HABEAS CORPUS

The respondent believes that the review by this Court "limited to the question of the jurisdiction of the District Court on habeas corpus" (R. 33) does not include review of the various grounds for habeas corpus alleged in the petition other than the alleged lack of exclusive jurisdiction of the United States. But since the question whether any particular alleged ground for habeas corpus is valid may be said to involve the "jurisdiction of the District Court on habeas corpus" to grant the writ on that ground, various alleged grounds set forth in the petition are discussed briefly.

In the second group of reasons (R. 3–6), the petition for a writ of habeas corpus alleges a denial of due process of law because the indictment does not charge the offense with sufficient particularity, a common design of the three defendants to murder the deceased, the guilty knowledge or criminal purpose, the time, place, and circumstances of the alleged crime, or that the killing was done feloniously; because the case was transferred from the Atlanta to the Rome Division of the District Court for the Northern District of Georgia without petitioner's consent; because he was tried in a county

of the State of Georgia in which no part of the Chickamauga National Park was located; because the petitioner was not furnished with a copy of the indictment and a list of witnesses prior to trial; because no stenographic copy of the testimony was made and preserved so that the petitioner "might hope to appeal"; and because under the allegations in the indictment only one of the defendants could be guilty of the crime.

1. With respect to the allegation that the indictment failed to charge the offense with sufficient particularity the court below held, correctly the respondent submits, that this objection was not available on habeas corpus. *Knewel* v. *Egan,* 268 U. S. 442, 446; *United States* v. *Pridgeon,* 153 U. S. 48, 59; *Cuddy, Petitioner,* 131 U. S. 280, 286; *Campbell* v. *Aderhold,* 67 F. (2d) 246 (C. C. A. 5th).

2. The court below also correctly held that the contention that the three defendants could not be guilty of the murder is not valid. *St. Clair* v. *United States,* 154 U. S. 134, 145.

3. The court below also held correctly that the statute in defining a crime does not use the word "felonious" and that the indictment is not required to charge that the offense was committed "feloniously." In defining the crime of murder the statute (Criminal Code, Secs. 273, 274) does not use the term "feloniously." *Myres* v. *United States,* 256 Fed. 779, 782–783 (C. C. A. 5th).

Speaking of the petitioner's other objections, the court below concluded (R. 32):

> The other objections urged by the appellant are wholly insufficient in point of law and call for no discussion.

4. The allegation that a co-defendant has admitted that he alone was guilty of the crime and that the petitioner had no guilty knowledge is no ground for habeas corpus. *Figueroa* v. *Saldana*, 23 F. (2d) 327 (C. C. A. 1st), certiorari denied, 277 U. S. 574.

5. The petitioner did not support the various allegations that the trial court refused to have a stenographic record of the testimony of the trial taken, that the petitioner was denied compulsory process for obtaining witnesses, and that the petitioner was denied the right to appeal as the result of lack of transcript of the testimony. At most these allegations relate to errors and irregularities which did not affect the jurisdiction of the trial court and cannot be corrected on habeas corpus. *Ex parte Harding*, 120 U. S. 782, 784.

In the final analysis it is submitted that the District Court, under all the circumstances of the instant case, properly denied the petition for a writ of habeas corpus. The record did not show on its face that the trial court whose judgment was attacked was without jurisdiction. Aside from the mere general allegations contained in the petition for habeas corpus, there was nothing before the

petitioned court which would indicate that the trial court was without jurisdiction, or that the petitioner was denied any constitutional right which would render the judgment void. The question of the jurisdiction of the trial court involved a determination of an apparently disputed question of law, i. e., whether the State of Georgia had granted to the United States exclusive jurisdiction over the Chickamauga and Chattanooga National Park. Under the decisions we have heretofore cited, a district court on habeas corpus cannot inquire into this disputed question.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

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JANUARY 1939.

APPENDIX

Revised Statutes, Sec. 751 (U. S. Code, Title 28, Section 451) reads as follows:

> The Supreme Court and the district courts shall have power to issue writs of habeas corpus.

Revised Statutes, Sec. 752 (U. S. Code, Title 28, Section 452) reads as follows:

> The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

Revised Statutes, Sec. 753 (U. S. Code, Title 28, Sec. 453) as far as material, reads as follows:

> The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; * * *.

Section 272 of the Criminal Code (Title 18, U. S. C., Sec. 451) in part provides:

> The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> * * * * *
>
> Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Section 273 of the Criminal Code (Title 18, U. S. C., Sec. 452) provides:

> Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.

Section 275 of the Criminal Code (Title 18, U. S. C., Sec. 454) provides:

> Every person guilty of murder in the first degree shall suffer death. Every person guilty of murder in the second degree shall be imprisoned not less than ten years and may be imprisoned for life. Every person guilty of voluntary manslaughter shall be

imprisoned not more than ten years. Every person guilty of involuntary manslaughter shall be imprisoned not more than three years, or fined not exceeding $1,000, or both.

Georgia Laws, 1890, p. 344:[1]

Whereas, By section two of the Act of Congress, entitled, "an Act to establish a National Military Park at the battlefield of Chickamauga," approved August 19th, 1890,[2] it is provided that, upon the cession of jurisdiction by the Legislature of the State of Georgia over the lands and roads hereinafter mentioned, and the report of the Attorney-General of the United States that a perfect title has been secured by the United States thereto, under the provisions of the Act of Congress of August 1st, 1888, chapter 728, the lands and roads embraced in the area, bounded as described therein, together with the roads described in section one of said Act, first above mentioned, shall be, and are thereby declared to be, a National Park, to be known as the Chickamauga and Chattanooga National Park; that is to say, the area inclosed by a line, beginning on the Lafayette or State Road, in Georgia, at a point where the bottom of the ravine, next north of the house, known on the field of Chickamauga as the Cloud House, and being about six hundred yards north of said house, due east to the Chickamauga river, and due west to the intersection of the Dry Valley road, at McFarland's Gap; thence along the west side of the Dry Valley and Crawfish Springs roads to the south side of the road from Crawfish Springs to Lee and Gordon's

[1] This Act is also set forth in Laws of Georgia, 1890–1891, pp. 199–200.

[2] The Act referred to is the Act of August 19, 1890, chapter 806, 26 Stat. p. 333 (U. S. C., Title 16, Sec. 424).

Mills; thence along the south side of the last named road to Lee and Gordon's Mills; thence along the channel of the Chickamauga river to the line forming the northern boundary of the park, as hereinbefore described, containing seven thousand and six hundred acres more or less; therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, That the jurisdiction of this State is hereby ceded to the United States of America over all such lands and roads as are described and referred to in the foregoing preamble to this Act, which lie within the territorial limits of this State, for the purpose of a National Park, or so much thereof as the National Congress may deem best; *provided,* that this cession is upon the express condition that the State of Georgia shall so far retain a concurrent jurisdiction with the United States over said lands and roads, as that all civil and criminal process, issued under the authority of this State may be executed thereon in like manner as if this Act had not been passed; and upon the further express conditions, that the State shall retain its civil and criminal jurisdiction over persons and citizens in said ceded territory, as over other persons and citizens in this State and the property of said citizens and residents thereon, except land and such other property as the General Government may desire for its use, and that the property belonging to persons residing within said ceded territory shall be liable to State and county taxes, the same as if they resided elsewhere; and that citizens of this State, in said ceded territory, shall retain all rights of State suffrage and citizenship; *provided further,* that nothing herein contained shall interfere with the

jurisdiction of the United States over any matter or subjects set out in the Act of Congress establishing said National Park, approved August 19th, 1890; or with any laws, rules or regulations that Congress may hereafter adopt for the preservation and protection of its property and rights in said ceded territory, and the proper maintenance of good order therein; *provided further,* that this cession shall not take effect until the United States shall have acquired title to said lands.

SEC. II. *Be it further enacted,* That all laws and parts of laws in conflict with this Act be, and the same are, hereby repealed.

Approved November 19, 1890.

Georgia Laws, 1927, p. 352:

An Act To provide for the acquisition of land in the State of Georgia by the United States for governmental purposes; to cede jurisdiction to the United States under certain limitations; and for other purposes.

SECTION 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that the consent of the State of Georgia is hereby given, in accordance with the 17th clause, 8th section, and of the 1st article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, any land in this State which has been or may hereafter be acquired for custom-houses, post-offices, arsenals, other public buildings whatever, or for any other purposes of government.

SEC. 2. Be it further enacted by the authority aforesaid, that the exclusive juris-

diction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes, except that the State retains the right to serve thereon all civil and criminal processes issued under authority of the State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.

SEC. 3. Be it further enacted by the authority aforesaid that the jurisdiction hereby ceded shall not vest until the United States shall have acquired the title to the said lands by purchase, condemnation, or otherwise; and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all State, county, and municipal taxation, assessment, or other charges which may be levied or imposed under authority of the State.

Approved August 23, 1927.

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SUPREME COURT OF THE UNITED STATES.

No. 359.—October Term, 1938.

Hugh Allen Bowen, Petitioner,
vs.
James A. Johnston, Warden, United States Penitentiary, Alcatraz, California.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 30, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner was convicted, in 1933, in the District Court of the Northern District of Georgia, of murder committed in 1930 on the Government Reservation known as the Chickamauga and Chattanooga National Park within the exterior limits of the State of Georgia. He was sentenced to imprisonment for life and is confined in the prison at Alcatraz, California.

In 1937, he presented a petition for a writ of *habeas corpus* to the District Judge of the Northern District of California alleging that the indictment was void, and no legal judgment could be based thereon, as it failed to show jurisdiction over the person and subject matter; that the United States did not have exclusive jurisdiction over the Park.[1] He also alleged that on his trial the court did not have the evidence taken down and preserved so that he might appeal, and that, upon this ground and others, he had been deprived of his liberty without due process of law. A copy of the indictment was annexed to the petition. Pursuant to an order to show cause, the Warden made return showing the judgment and the record of commitment. On the return day there was no appearance of petitioner's attorneys, and no evidence, apart from the return and the attached exhibits, was offered. The petition was submitted and later was denied without opinion. On appeal, the order was affirmed. 97 F. (2d) 860.

The principal contention before the Circuit Court of Appeals was that the United States did not have exclusive jurisdiction over

[1] Criminal Code, Sec. 272, Third; 18 U. S. C. 451.

the Park and hence that the District Court in Georgia did not have jurisdiction to try the petitioner. The court, taking the view that the United States could constitutionally acquire jurisdiction over the Park (*Collins* v. *Yosemite Park Co.*, 304 U. S. 518), held that the question whether the United States did acquire such jurisdiction could not be raised on *habeas corpus*. In view of the importance of the question thus presented, we granted certiorari. October 10, 1938.

First.—Jurisdiction is conferred upon the District Courts "of all crimes and offenses cognizable under the authority of the United States". Jud. Code, sec. 24; 28 U. S. C. 41(2).

Crimes are thus cognizable—

"When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building". Crim. Code, sec. 272; 18 U. S. C. 451, Third.

The last clause covers cases where exclusive jurisdiction is acquired by the United States pursuant to Article I, section 8, paragraph 17, of the Constitution.

In the instant case, no question of fact was presented with respect to the place where the crime was committed. The indictment specified the place, that is,—

"a certain place and on certain lands reserved and acquired for the exclusive use of the United States and under exclusive jurisdiction thereof, and acquired by the United States by consent of the Legislature of the State of Georgia, to wit: Chickamauga and Chattanooga National Park, sometimes known as Chickmauga and Chattanooga National Military Park, in said State of Georgia".

The sole question was whether this Park was within the exclusive jurisdiction of the United States. There is no question that the United States had the constitutional power to acquire the territory for the purpose of a national park and that it did acquire it. Whether or not the National Government acquired exclusive jurisdiction over the lands within the Park or the State reserved, as it could, jurisdiction over the crimes there committed, depended upon the terms of the consent or cession given by the legislature of Georgia. *Collins* v. *Yosemite Park Co.*, *supra*, pp. 529, 530. See, also, *James* v. *Dravo* ~~Construction~~ Contracting *Co.*, 302 U. S. 146-148. The fed-

eral courts take judicial notice of the Georgia statutes. *Owings* v. *Hull*, 9 Pet. 607; *Lamar* v. *Micou*, 114 U. S. 218, 223. If these statutes did not give to the United States exclusive jurisdiction over the Park, the indictment did not charge a crime cognizable under the authority of the United States.

Second.—Where the District Court has jurisdiction of the person and the subject matter in a criminal prosecution, the writ of *habeas corpus* cannot be used as a writ of error. The judgment of conviction is not subject to collateral attack. *Ex parte Watkins*, 3 Pet. 193, 203; *Ex parte Parks*, 93 U. S. 18, 23; *Harlan* v. *McGourin*, 218 U. S. 442, 448; *McMicking* v. *Schields*, 238 U. S. 99, 107; *Riddle* v. *Dyche*, 262 U. S. 333, 335; *Craig* v. *Hecht*, 263 U. S. 255, 277. The scope of review on *habeas corpus* is limited to the examination of the jurisdiction of the court whose judgment of conviction is challenged. *Ex parte Siebold*, 100 U. S. 371, 375; *Ex parte Bigelow*, 113 U. S. 328, 331; *Matter of Gregory*, 219 U. S. 210, 213; *Glasgow* v. *Moyer*, 225 U. S. 420, 429; *Knewel* v. *Egan*, 268 U. S. 442, 445. But if it be found that the court had no jurisdiction to try the petitioner, or that in its proceedings his constitutional rights have been denied, the remedy of *habeas corpus* is available. *Ex parte Lange*, 18 Wall. 163, 178; *Ex parte Crow Dog*, 109 U. S. 556, 572; *In re Snow*, 120 U. S. 274, 285; *In re Coy*, 127 U. S. 751, 758; *Hans Nielsen, Petitioner*, 131 U. S. 176, 182; *In re Bonner*, 151 U. S. 242, 257; *Moore* v. *Dempsey*, 261 U S. 86, 91; *Johnson* v. *Zerbst*, 304 U. S. 458, 467.

In applying this principle, we have said that the court "has jurisdiction to render a particular judgment only when the offence charged is within the class of offences placed by the law under its jurisdiction". *In re Bonner, supra.* As it is the duty of the District Court, when the prosecution is brought before it, to examine the charge and ascertain whether the offense is of that class, the District Court is thus empowered to pass upon its own jurisdiction. This, under the applicable statute, may require consideration of the place where the offense is alleged to have been committed. The answer to that question may require the examination and determination of questions of fact and law and that determination may be the appropriate subject of appellate review. Thus if, construing a statute, a question of law is determined against the Government on demurrer to the indictment, the case may fall within the provisions of the Criminal Appeals Act. *United States* v. *Sutton*, 215

U. S. 291; *United States* v. *Soldana*, 246 U. S. 530. Or, if decided against the accused, the question may be reviewed by the Circuit Court of Appeals on appeal from the judgment of conviction. In considering the distribution of appellate jurisdiction under the former statute[2] permitting a direct writ of error from this Court to the District Court, when the question of the jurisdiction of the latter was the only question involved, we drew the distinction between the question of the jurisdiction of the District Court in that aspect and that of the jurisdiction of the United States. *Louie* v. *United States*, 254 U. S. 548, 550. There, on a charge of murder committed within the limits of an Indian reservation, the defendant contended that before the time of the alleged crime he had been declared competent and that the land on which the crime was alleged to have been committed "had been allotted and deeded to him in fee simple". "That the District Court . . . had jurisdiction to determine whether the *locus in quo* was a part of the reservation was not questioned" and the judgment was held to be reviewable by the Circuit Court of Appeals and not directly by this Court. See, also, *Pronovost* v. *United States*, 232 U. S. 487; *Pothier* v. *Rodman*, 261 U. S. 307, 311.

Where on the face of the record the District Court has jurisdiction of the offense and of the defendant and the defendant contends that on the facts shown the crime was not committed at a place within the jurisdiction of the United States, we have held that the judgment is one for review by the Circuit Court of Appeals in error proceedings and that the writ of *habeas corpus* is properly refused. *Toy Toy* v. *Hopkins*, 212 U. S. 542, 549. And, on removal proceedings, we have observed that in a case where the question "whether the *locus* of the alleged crime was within the exclusive jurisdiction of the United States demands consideration of many facts and seriously controverted questions of law", these matters "must be determined by the court where the indictment was found" and that "the regular course may not be anticipated by alleging want of jurisdiction and demanding a ruling thereon in a *habeas corpus* proceeding". *Rodman* v. *Pothier*, 264 U. S. 399, 402. See, also, *Henry* v. *Henkel*, 235 U. S. 219, 229. On the same principle, in *Walsh* v. *Archer*, 73 F. (2d) 197, where the indictment charged murder committed on board a vessel on the high seas, the

[2] 36 Stat. 827; 36 Stat. 1157, Jud. Code, sec. 238.

court affirmed an order dismissing a petition for *habeas corpus*, it being contended that the vessel at the time of the commission of the crime was within the State of California and under its jurisdiction, saying—"Whether the location of the alleged crime was upon the high seas and exclusively within the jurisdiction of the United States required consideration of many facts and seriously controverted questions of law, including the alleged error involving the jurisdiction of the court". *Id.*, p. 199.

But the rule, often broadly stated, is not to be taken to mean that the mere fact that the court which tried the petitioner had assumed jurisdiction, necessarily deprives another court of authority to grant a writ of *habeas corpus*. As the Court said in the case of *Coy, supra*, pp. 757, 758, the broad statement of the rule was certainly not intended to go so far as to mean, for example, "that because a federal court tries a prisoner for an ordinary common law offence, as burglary, assault and battery, or larceny, with no averment or proof of any offense against the United States, or any connection with a statute of the United States, and punishes him by imprisonment, he cannot be released by *habeas corpus* because the court which tried him had assumed jurisdiction". Despite the action of the trial court, the absence of jurisdiction may appear on the face of the record (see *In re Snow, supra; Hans Nielsen, Petitioner, supra*, p. 183) and the remedy of *habeas corpus* may be needed to release the prisoner from a punishment imposed by a court manifestly without jurisdiction to pass judgment.

It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. *Ex parte Lange, supra*. The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of *habeas corpus* when it appears that nevertheless the trial court was without jurisdiction. The rule is not one defining power but one which relates to the appropriate exercise of power. It has special application where there are essential questions of fact determinable by the trial court. *Rodman* v. *Pothier, supra*. It is applicable also to the determination in ordinary cases of disputed matters of law whether they relate to the sufficiency of the indictment or to the validity of the

statute on which the charge is based. *Id.; Glasgow* v. *Moyer, supra; Henry* v. *Henkel, supra.* But it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent. Among these exceptional circumstances are those indicating a conflict between state and federal authorities on a question of law involving concerns of large importance affecting their respective jurisdictions. *In re Lincoln,* 202 U. S. 178, 182, 183; *Henry* v. *Henkel, supra,* pp. 228, 229.

We think that there are such exceptional circumstances in this instance. There appear to be uncertainty and confusion with respect to the question whether offenses within the Chickamauga and Chattanooga National Park are triable in the state or federal courts. It is represented that murder cases have been tried in the state court as well as in the federal court. If the District Court which tried petitioner gave consideration to the question, it made no comment on the subject, as it rendered no opinion and apparently made no record of its proceedings aside from the indictment and judgment. The matter stood without any judicial explication and without appeal. If, as contended, there being no disputed questions of fact, a reading of the Georgia statute of consent and cession would show that the United States had not acquired jurisdiction so as to bring the offense charged in the indictment within the class of offenses cognizable in the District Court, we think that it was within the province of the court to which the application for *habeas corpus* was made to examine the question and to issue the writ in case the claim of want of jurisdiction in the trial court was found to be a valid one.

Third.—Our examination of the Georgia statutes leads to the conclusion that it is unnecessary to remand the case for the determination of the District Court but that it may be, and should be, disposed of at once by our decision.

The lands which are embraced within the Chickamauga and Chattanooga National Park, and lie within the exterior limits of the State of Georgia, were acquired under the provisions of the Act of Congress approved August 19, 1890, and supplementary legislation. 26 Stat. 333. The Act provided for the establishment of the Park "upon the ceding of jurisdiction by the legislature of the State of Georgia". The lands were acquired in 1891 and subsequent years. Some were acquired by purchase and some by condemnation. Consent was given and jurisdiction was ceded to the

United States by an Act of the Legislature of Georgia approved November 19, 1890. Georgia Laws, 1890-91, vol. 1, p. 199. The Act specifically reserved to the State of Georgia criminal jurisdiction in the ceded territory by the following proviso:

"*provided*, that this cession is upon the express condition that the State of Georgia shall so far retain a concurrent jurisdiction with the United States over said lands and roads as that all civil and criminal process issued under the authority of this State may be executed thereon in like manner as if this Act had not been passed; and upon the further express conditions, that the State shall retain its civil and criminal jurisdiction over persons and citizens in said ceded territory as over other persons and citizens in the State, and the property of said citizens and residents thereon, except land and such other property as the general government may desire for its use, and that the property belonging to persons residing within said ceded territory shall be liable to State and county taxes, the same as if they resided elsewhere, and that citizens of this State in said ceded territory shall retain all rights of State suffrage and citizenship;"

Later Acts of cession contained a similar reservation as to criminal jurisdiction.[3]

If the matter rested with these statutes, there would be no room for doubt that jurisdiction to punish for crimes committed on the lands within the Park remained with the State. See *James* v. *Dravo Contracting Co.*, *supra*. But in 1927, another cession act of a general character was passed by the state legislature, purporting to cede exclusive jurisdiction to the United States over any land "which has been or may hereafter be acquired for custom-houses, post-offices, arsenals, other public buildings whatever, or for any other purposes of government". Georgia Laws, 1927, p. 352. This Act reserved the right to serve civil and criminal processes but not criminal jurisdiction over offenses within the ceded territory.

The argument is strongly pressed that as this is a general act and there is no express repeal of, or specific reference to, the earlier special acts relating to the lands within the Park, it should not be regarded as yielding the jurisdiction which the earlier acts reserved to the State. But we find that the administrative construction is to the contrary. The administration of the Park was placed with the War Department[4] and it appears from its files that on July 14,

[3] Georgia Laws, 1893, p. 110; 1895, p. 77; 1901, p. 85; 1902, p. 110.

[4] Transferred to the National Parks Service, Department of the Interior by Executive Order No. 6166, June 10, 1933.

1930, upon a review of the pertinent legislation, the Judge Advocate General gave an opinion that the Act of 1927 "vests exclusive jurisdiction in the United States over that part of the Chickamauga and Chattanooga National Military Park located within the State of Georgia" and that violations of law occurring on the ceded lands are enforceable only by the proper authorities of the United States. As this administrative construction is a permissible one we find it persuasive and we think that the debated question of jurisdiction should be settled by construing the Act of 1927 in the same way.

On this ground, the judgment of the Circuit Court of Appeals, affirming the order of the District Court denying the petition for *habeas corpus*, is affirmed.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.